Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

DALE ROBERTSON AND CHRISTINE ROBERTSON,
Petitioners,

vs.

THE CITY OF SOUTH GATE, CALIFORNIA, et al.,
Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether governmental action which exceeded the scope of an abatement warrant stemming from a municipal nuisance abatement resolution both in time and in place constituted a regulatory taking or an actual taking requiring compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Assuming the governmental action was a regulatory taking, whether a California requirement a property owner seek judicial review of the nuisance abatement resolution by way of a petition for writ of mandate as a prerequisite to an inverse condemnation action constitutes a "reasonable, certain and adequate provision for obtaining compensation" as required by the Fifth and Fourteenth Amendments if the property owner is challenging the manner in which the municipality implemented the nuisance abatement resolution rather than the terms of the resolution itself.

PARTIES TO THE PROCEEDING

Petitioners:	Dale Robertson and Christine Robertson
Respondents:	The City of South Gate, California, and its associated defendants, Encarnacion Cervantes, Todd Agrow, Donald Leur, William Cornett, Steven Rosenblit; and C. L. Taylor Wrecking Company
Other party:	Defendant Milton Inbody, who has no interest in the outcome of this Petition

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UNITED STATES:

Dale and Christine Robertson, by and through their counsel of record, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, filed in the above proceeding on December 9, 1996.

OPINION BELOW

The unpublished opinion of the court of appeal affirmed the judgment of the trial court and is attached as Appendix A.

JURISDICTION

The jurisdiction of this Supreme Court to review the judgment of the Court of Appeal of the State of California is invoked under 28 U.S.C. section 1257, subdivision (a), and Supreme Court Rules 10(1)(b) and 10(1)(c).

DATE OF ENTRY OF JUDGMENT

The trial court's judgment was entered February 15, 1995. (AA 1111.) The inverse condemnation issues concerning which petitioners seek certiorari had been decided prior to trial by demurrer and summary adjudication proceedings on January 20, 1993 (App. E); March 31, 1993, (App. F); and January 6, 1994. (App. G.)

The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Two, was

filed December 09, 1996, and is attached as Appendix A. On January 15, 1997, the Robertsons petitioned the California Supreme Court for review of this decision, which petition was denied on February 19, 1997. (App. C.) Resolution 5009 of the City of South Gate, which is at issue in this proceeding, is attached hereto as Appendix D.

STATUTE INVOLVED[1]

California Code of Civil Procedure section 437c.

CONSTITUTIONAL PROVISION AT ISSUE

United States Constitution, Amendment 5:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] This statute is set out verbatim in Appendix H. (Sup. Court Rule 14(1)(f).)

STATEMENT OF THE CASE

Federal Question

The Federal question at issue in this petition was first raised in the initial complaint filed in this case in which the Robertsons alleged they were "entitled to just compensation for the damages and destruction caused by the City defendants to their real and personal property under Article I section 19 of the California Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution." (AA 20.)

Procedural Facts

On August 13, 1992, appellants Dale and Christine Robertson[2] ("petitioners" or "Robertsons") filed their complaint against the City of South Gate and various governmental entities and employees for inverse condemnation and other causes of action arising out of the City's action of demolishing a building and removing certain personal property which remained on the Robertson's real property after a fire had destroyed the business operated there. (AA 1.)

On December 7, 1992, the City of South Gate and the South Gate defendants (collectively "City") filed moving papers in support of a motion to strike certain portions of the complaint concerning the inverse condemnation causes of action. (AA 77.) The motion sought "an order striking those portions of the plaintiffs' first amended complaint that pertain to the propriety of the City's determination that the condition of plaintiffs' property, located at 5870 Imperial Highway, constituted a nuisance, and to

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[2] The Robertsons' children were also plaintiffs. However, they later dismissed their claims. (AA 427, 428 & 432.)

the alleged dispute between the City and plaintiffs regarding the gravity of the damage caused by the fire that occurred on plaintiffs' property." (AA 78.) The motion was based on the legal contention the Robertsons could not pursue these causes of action because they had not first sought to "invalidate" the nuisance determination made by the City by way of a petition for writ of administrative mandamus. (AA 83.) On January 13, 1993, the Robertsons filed their opposition to the motion to strike, contending a petition for writ of mandate was not required in this case. (AA 120.)

On January 20, 1993, the trial court granted the motion to strike, ruling "that a landowner deprived of his property by the excessive use of police power may not sue in inverse condemnation without challenging the administrative action by mandamus." (AA 182, App. E.) The Robertsons were granted ten days leave to amend their complaint. (AA 182-185.) The Robertsons Second Amended Complaint was filed February 1, 1993. (AA 187.) It contained the same causes of action as the first amended complaint but with additional factual allegations.

On March 2, 1992, the City filed a second motion to strike founded on the same basis as the first, i.e., that the Robertsons' causes of inverse condemnation were barred because they had not first pursued a petition for writ of administrative mandamus. (AA 247.) On March 31, 1993, the court granted the City's motion to strike without leave to amend on the same basis as its earlier ruling, i.e., that the Robertsons' had failed to challenge the City's initial determination by way of a petition for writ of administrative mandamus. (*Ibid.*, App. F.)

On November 15, 1995, the City filed its moving papers in support of a motion for summary adjudication

of issues. (AA 435.) The motion sought summary adjudication of all the inverse condemnation causes of action in its favor as well as the declaratory relief causes of action and the cause of action for violation of civil rights. (AA 436-437.)

On November 24, 1993, the City filed an additional set of moving papers in support of another motion for summary adjudication of issues which sought adjudication in favor of the City of the fifth cause of action for conversion, the seventh cause of action for trespass, and the eighth cause of action for false imprisonment. (AA 669-710.)

On January 6, 1994, the trial court granted the City's summary adjudication motion which had been filed November 15, 1993, on the same basis as it granted the motion to strike, i.e. that the Robertsons were precluded from pursuing inverse condemnation causes of action because they had not sought relief via a petition for writ of administrative mandamus. (AA 1052, App. G.)

As for the City's motion for summary adjudication filed November 24, 1993, the court granted it in part. (AA 1053.) However, the court denied the motion as it related to the false arrest cause of action on behalf of Dale Robertson. (AA 1053.) As a result of these multiple motions, the matter then proceeded to trial on the false arrest claim of Dale Robertson against the City and the professional negligence claim against designer Milton Inbody. On January 24, 1994, trial began, the Robertsons representing themselves in pro per. The jury found in favor of the defendants. Judgment was entered on February 15, 1995 (AA 1111), and on April 15, 1994, the Robertsons filed a timely notice of appeal. (AA 1125.) On December 9, 1996, the Court of Appeal filed its opinion, affirming the judgment. (App. A.) On December 24, 1996,

the Robertsons filed a petition for rehearing which was denied January 8, 1997. (App. B.)

On January 15, 1997, the Robertsons filed a timely petition for review in the California Supreme Court, which was denied on February 19, 1997. (App. C.)

FACTS

I. FACTS RELEVANT TO PLEADING ISSUES (MOTIONS TO STRIKE).[3]

Dale and Christine Robertson owned the property located at 5870 East Imperial Highway in South Gate, California, and operated the business located thereon, Imperial Tire Company. (AA 31-32.) A fire occurred at the business in September 1990 which "resulted in some damage to the inventory and equipment and to a portion of one of the structures used in the tire business." (AA 35-36.)

The City falsely determined the building had sustained damage "which would have a cost of repair greater than fifty per cent of the cost of replacing all the business structures." (AA 36-37.) This determination prevented the Robertsons from being able to rebuild the structure. (*Ibid.*) The Robertsons obtained numerous estimates from contractors substantiating the fact the damage to the structure was less than 50%. (AA 37.)

In response to a request from the City that the Robertsons obtain an assessment form a fire damage

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[3] Because these matters were determined in summary proceedings rather than after a trial, the facts are construed most favorably to the Robertsons under California law. (*Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985); *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092, 1107 (1988).)

expert, the Robertsons engaged Mr. Milton Inbody in April 1991, who also determined the cost to repair was less than 50%. (AA 38.) In May 1991 the Robertsons, Inbody and the City met and the City "decided to accept and process the plans for repair prepared by Mr. Inbody and which contemplated rebuilding the structure in the location and manner as it previously had existed." (AA 38.) Mr. Cervantes from the City had represented the City had changed its conclusion and agreed "that the costs of repair of the fire damage was less than fifty percent of the replacement cost." (AA 38-39.)

In early August 1991, a Notice to Property Owner to Abate Public Nuisance was posted on the Robertson's property. (AA 42.) The matter was heard at a South Gate City Council meeting on August 12, 1991. (AA 42.) On August 26, 1991, the City Council passed Resolution 5009 in which it declared the condition of the property a nuisance and required the Robertsons to clean up the property and submit additional plans or the nuisance would be abated. (AA 97-102, App. D.)

Mr. Robertson's plans for the rebuilding of his building had been in the possession of the City of South Gate since May 1991. (AA 46.) On September 6, 1991, the plans "were entered into plan check with a plan check payment of $429.00." (*Ibid.*) "A few days later, Mr. Robertson received the plans back from the City with two pages of red-marked corrections from the Building Department and the Fire Department." (*Ibid.*) Robertson took the plans to Inbody so the corrections could be made. Inbody did not return the plans until October 29, 1991. (AA 46-47.)

On October 16, 1991, the city prosecutor "informed Mr. Robertson that . . . the City would proceed 'with the

abatement to tear down the walls.' " (AA 46.) On Monday, October 27, 1991, at 4:30 p.m., the city prosecutor, "Mr. Rosenblit contacted Mr. Robertson and informed him that there would be a Court hearing on Wednesday, October 30, 1991, at 2:00 p.m., before Judge Gafowski in South Gate Municipal Court to secure a Court order for a bulldozer to demolish his property." (AA 47.) "Mr. Robertson arrives at the Building Department at 8:15 a.m. on October 30, 1991, to submit the corrected plans prepared by Mr. Inbody. Don Leur at the Building Department refused to accept the plans and gave no reason for this refusal." (AA 47.) That afternoon the judge signed the abatement warrant. (AA 47-48.)

"On November 6, 1991, at 8:00 a.m., approximately 10 City employees arrived at the property with a bulldozer to carry out the Abatement Warrant." (AA 48.) On November 6 and 7 City employees seized Robertson's business inventory. The "City employees also seized inventory on personal property on his *separate and adjoining property* which was not listed in the Abatement Warrant or addressed in any prior proceeding of the City or the Court." (AA 48, original emphasis.) The bulldozer began to knock down the building's wall at about 2:00 p.m. on November 8, 1992. The bulldozer "was very careful not to damaged [sic] the iron rebar protruding from the structure's concrete foundation footings" which was necessary to rebuild the building. (AA 49.)

"Under the express terms of the Abatement Warrant, the City had from October 30, 1991, fourteen days to complete the abatement and return the warrant to the judge. The fourteenth day was November 13, 1991, by which time the job was almost finished." (AA 49.) "On the morning of the fifteenth day, (November 14, 1991) Mr. Robertson was legally entitled to retake possession of his

property. When the abatement workers arrived that day, Mr. Robertson informed them that they had been allowed enough time and that he would take care of the rest, as there was only a small spot of wall left, about 4 feet in height. About 90% of the wall was gone, and the rebar was protruding from the footings. The wrecking company workers telephoned the City, who in turn contacted the police at the property." (AA 50.) Mr. Robertson indicated to the police the time had expired and requested the City's workers be ordered to leave his property. "Mr. Robertson was then arrested for obstruction and taken to the South Gate city jail." (AA 50.)

An extension of time for the abatement warrant was signed later that day. (AA 50.) On November 15, 1991, the charges were dismissed against Mr. Robertson because the abatement warrant had expired. (AA 50-51.)

Second Amended Complaint

The allegations of the second amended complaint were similar to those of the first amended complaint. However, the second amended complaint did include additional factual allegations. It included the legal descriptions of the adjoining parcels of real property (the "north property" and the "west property") also owned by the Robertsons as well as an allegation the parcels are specifically delineated on the parcel map. (AA 188-189.) The second amended complaint also included, *inter alia*, the following additional allegations.

"No fire damage occurred to structures or personalty located on the west property or on the north property, and no personnel of the South Gate Fire Department ever took any fire suppression action or made any inspection

of the structures or personalty located on the north property or the west property related to the fire on the business property." (AA 192.)

The City defendants "engaged in a continuing course of conduct which thwarted the Robertsons' good faith efforts to repair and reopen their business, even though the Robertsons' efforts proposed to repair and reconstruct the business property in full compliance with all laws, ordinances and City requirements." (AA 193.) "The City Defendants also took actions and imposed improper conditions on the Robertsons that prevented the Robertsons from complying with the lawful demands of the City Defendants." (AA 193.) "The City Defendants thereafter throughout 1990, 1991, and 1992 rejected all requests and plans submitted by the Robertsons to repair or rebuild the damaged property, even though such requests and plans were otherwise in full compliance with all laws, local ordinances, and usual and proper requirements of the City." (AA 193.)

Pursuant to Resolution 5009, the Robertsons submitted plans for repair of the east property structure on September 6, 1991. (AA 209.) On November 6th and 7th, 1991, "the City employees also seized inventory and personal property on his *separate and nearby property* which was not listed in the Abatement Warrant, Resolution 5009, or addressed in any prior proceeding of the City or a Court." (AA 212-213.)

"A part of the demolition and after the original Abatement Warrant had expired, employees of the Wrecking Company cut off to ground level the iron rebar remaining on the property. The rebar was destroyed after the warrant had expired, when the workers no longer had any right to be on the property, and prior to the time the warrant was extended." (AA 215.)

Resolution 5009

In support of the motion to strike, the City requested the court take judicial notice of Resolution 5009, which was "adopted" August 26, 1991. (AA 237-242, 253.) The resolution was entitled "a resolution of the city council of the City of South Gate declaring the condition of the property located at 5870 Imperial Highway to be a public nuisance and ordering the abatement thereof." The resolution declared, *inter alia,* that the masonry walls of the structure did not have sufficient lateral support and that "the property was strewn with debris, including used vehicle tires, household furniture and flammable liquids." (AA 238.) The resolution found the condition of the property and structure constituted a nuisance and set forth a timetable in which the Robertsons were to submit plans for the restoration of the premises and take various other actions to rectify the problem. (AA 230-240.)

Section 6 of the resolution provided that the Director of Building and Safety was directed to cause the nuisance to be abated by "clearing the property and demolishing the walls" if the Robertsons did not abate it themselves. (AA 240-241.)

II. FACTS RELEVANT TO SUMMARY ADJUDICATION PROCEEDINGS.

The Robertsons supplied numerous facts to demonstrate they complied with Resolution 5009. On September 2, 1991, the Robertsons wrote to Mr. Cervantes of the Department of Building and Safety of the City of South Gate informing him they had complied with the resolution. (AA 625.) Mr. Rudell from the Department had informed Dale that the resolution referred to the tires and rims stored on the roof of the canopy. (AA 625.) Those had been removed.

Robertson had submitted plans to Cervantes at the Building Department in June of 1991 but he "would not enter them into plan check until September 6, 1991." (AA 665.) The Robertsons resubmitted a set of plans along with the appropriate plan check fee of $429.17 on September 6, 1991, which was prior to the 15-day time limit set by Resolution 5009, which had been passed August 26, 1991. (AA 670.)

In the letter of September 2, which was stamped "received" by the Department of Building and Safety on September 3, 1991, the Robertsons requested a prompt "review of these plans to determine is they in fact show 'complete plans and structural calculations.' " (AA 625.) Robertson wrote that Mr. Inbody would make any revisions required. (*Ibid.*) Additionally, Robertson notified the City an independent testing firm, Smith-Emery, had conducted tests of the structural integrity of the walls, and the results were expected shortly. (AA 625-626.)

On September 12, 1991, the Robertsons' attorney, Gene Beckman, wrote Mr. Rudell, counsel for the City of South Gate, reporting "that the acts required during the initial 15 day period were completed on or before the expiration thereof, with the exception of the receipt of the structural test report on the reinforcement bars. This was FAXed by Smith-Emery to the Building Official on September 6, 1991." (AA 627.) Beckman requested the plan check of the plans be expedited because of the time frame in the resolution. (*Ibid.*)

The City returned the plans on September 27, 1991 for corrections. Robertson "immediately" took them to Inbody to have the corrections made. (AA 671.) The Robertsons had been told by Don Leur from the Department of Building and Safety not to worry about the time limit because "the plans were in the system." (AA 672.)

On Monday, October 27, 1991, the city prosecutor, Mr. Rosenblit, informed Dale Robertson "there would be a hearing on Wednesday afternoon, October 30, 1991 at 2:00 p.m. to get an order for the bulldozer to come back" (AA 672.)

Robertson "picked up the corrected plans from Mr. Inbody around 3:00 p.m. on October 29, 1991 and delivered them to Mr. Richard Shiotsugu for him to do the calculations." (AA 671.) Dale picked up the plans from engineer Shiotsugu the next morning, October 30, and took them to the building department at 8:15 a.m. At the building department "Don Leur refused to accept our revised plans on that date and would give us no reason why they were refusing to put them back into plan check." (AA 671.)

Attorney Beckman declared: "Dale Robertson was thwarted in his attempts to repair his building after the fire by what I felt were deliberate stalling maneuvers by the Building Department. . . . " (AA 661.) Beckman also worked with City Attorney Rudell after Resolution 5009. (AA 662.) On August 29, 1991, Cervantes, the director of the Department of Building and Safety, "inspected the property to verify that the toilet facilities had been removed and all flammable [sic] were out of the building." (AA 662.)

The Robertsons took the corrected plans with them to the hearing on October 30, 1991. (AA 672.) However, at the hearing on October 30, 1991, Judge Gafkowski approved the City's application for a warrant to demolish structures and clear the property pursuant to Resolution No. 5009. (AA 779-780.)

The abatement warrant covered the period extending from October 30, 1991 until November 13, 1991. (AA 674 & 779-780.) When the workers arrived on the morning of

the 15th day, Dale Robertson told them they had had enough time and that he would take care of the rest. (AA 674.) Dale Robertson was arrested that day. (AA 674-675.) At a hearing on November 15, 1991, the court found the original Abatement Warrant had expired at the time of Dale's arrest. (AA 676.)

While Dale was incarcerated, "the rebar which had been left for us to rebuild immediately had been cut off at the cement level that day." (AA 675.) "This was done on the day when they [the City] had no right to be on the property." (AA 675.) On November 14, 1991, Christine Robertson told one of the construction workers "he had no right to be on the property or the adjacent property scraping as the warrant time had run out." (AA 691.)

Rick Crowley also "witnessed the City's tractor going through the boundary [sic] wall and onto another property, not covered in the Abatement Warrant" during the abatement work. (AA 693.) On November 14, 1991, Crowley "observed workers on the property cutting the rebar off at ground level. . . . " (AA 694.) Kevin Robertson also "witnessed and took pictures of the City's bulldozer going through the boundary wall to the adjacent property" during the abatement. (AA 695-696.) Kevin also declared the workmen were ordered to cut off the rebar by City officials. (AA 696.) David Robertson also witnessed the bulldozer going onto the adjacent property not included in the abatement warrant and verified that the rebar was cut off on the 14th when the activity on the property was not covered by the abatement warrant. (AA 697-698.)

On November 18, 1991, the workmen returned and began to continue working on the adjacent property not covered by the abatement warrant until instructed to

leave by Mr. Cervantes of the building department. (AA 676-677, 691-692.)

III. FACTS ADDUCED AT TRIAL.

Attorney Beckman represented the Robertsons at the city council meeting of August 12, 1991. (RT 720.) Beckman described why they did not pursue a petition for writ of administrative mandate:

> "The writ was not applied for because the purpose of my representation of Mr. Robertson was to assist him in getting a building permit to repair the premises, the roof, the front wall, rather than tear it down. He had been thwarted in these efforts previously on the grounds of – by the building department that the property was destroyed to more than 50 percent of its replacement value, and therefore it had to be destroyed and rebuilt.
>
> "The city council after the hearing issued a resolution, and when I first read the resolution, for other reasons I was somewhat angry and wrote a letter to the city attorney, and I failed to read very closely language on page 4, line 4, the words are as follows: 'Further, the city council orders that if the property owner wishes to retain the walls and restore the structure. . . . ,' and that's the goal I was shooting for for Mr. Robertson. And then: in compliance with all current building and safety codes, the owner then must submit complete plans and structural calculations to show all the remaining building components were safe, et cetera.
>
> "So I regarded this as an authorization from the city council, albeit a very tight schedule, for submission of plans, approval of plans and construction of that – that this was the goal that we were seeking, and therefore we would work

under the resolution of the city council even though the time limits were short." (RT 738-739.)

The resolution "was more of a directions and guidelines for Mr. Robertson to follow relative to the structure that was burned by the fire, and was procedures he should follow to comply." (RT 425.) Dale Robertson "read in the resolution that if we would do certain things we would be able to obtain a building permit, and those certain things were carried out, including bracing the walls, removing flammable debris, all tires had to be removed from the building, and the toilet that was working just fine had to be removed." (RT 514.)

REASONS WHY THE PETITION SHOULD BE GRANTED

Introduction

The application of the Fifth Amendment to the states through the Fourteenth (see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (hereafter *"Penn Central"*)), creates a hollow right if states do not maintain adequate procedures ensuring the right to compensation for governmental takings. This petition should be granted so that this Supreme Court can establish guidelines for those procedures.

In the instant case, the California Court of Appeal erroneously allowed a judgment to stand which violated the Robertsons' property rights guaranteed by the Fifth and Fourteenth Amendments. This petition presents interesting and important issues dealing with what is and what is not a regulatory taking for purposes of requiring compensation under the Fifth and Fourteenth Amendments. Furthermore, it presents the question of whether or not it is proper to invoke the prerequisite of pursuing a

writ of mandate challenging a municipal ordinance or resolution if a property owner is not challenging the terms and conditions of the resolution itself but, rather, is challenging the manner in which the municipality seeks to enforce that resolution.

The Robertsons sued the City of South Gate and various governmental entities and employees for inverse condemnation, conversion, trespass and other causes of action arising out of the City's action of demolishing a building and removing certain personal property which remained on the Robertson's real property after a fire had destroyed their business. The Robertsons contended the City wrongfully hindered their efforts to comply with the City's Resolution 5009, which required them to rectify the conditions on the property, and the City exceeded the scope of an abatement warrant because it took and damaged personal property after the warrant had expired and took personal property on an adjacent parcel of land not covered by either Resolution 5009 or the abatement warrant.

The City contended its act constituted a "regulatory taking," and, therefore, the Robertsons were precluded from bringing an inverse condemnation action because they first had not sought relief by way of a petition for administrative mandate. The trial court agreed, as did the Court of Appeal.

The problem here is these acts did not constitute "regulatory takings" because the Robertsons were not challenging Resolution 5009 itself. At issue here were (1) the fact the City wrongfully thwarted the Robertsons' efforts to comply with the terms of Resolution 5009 and (2) the City's acts of taking, damaging and destroying property during a time when the abatement warrant was

not in effect and on real property not covered by either Resolution 5009 or the abatement warrant.

This case is properly before this Supreme Court because the processes provided by the State of California to seek and obtain compensation for governmental takings are constitutionally inadequate. As this Supreme Court has explained:

> "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. [Citation.] Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a ' "reasonable, certain and adequate provision for obtaining compensation" ' exist at the time of the taking. [Citations.] If the government has provided an adequate process of obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking. [Citations.]" (*Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-195 (1985), hereinafter *"Williamson"*.)

Conversely, if the State takes private property but does not observe reasonable and adequate procedures for obtaining compensation, then the State has violated the Fifth and Fourteenth Amendment rights of the property owner. California's procedures are not adequate because, *inter alia*, the lower courts misapplied and misconstrued the distinction between regulatory takings and "regular" takings and because the courts interposed a requirement the Robertsons first seek relief by way of a petition for writ of mandate challenging the resolution before initiating an action for inverse condemnation even though the Robertsons never did intend to challenge the terms of the

resolution itself but, rather, were challenging the City's implementation of the resolution.

Because the California courts' decision in this case conflicts with the law emanating from this Supreme Court and courts of other states concerning this important constitutional right, this Petition should be granted. (Sup. Ct. Rules, 10 (1)(b) & (c).) Only this United States Supreme Court can resolve the questions presented in this case. "Where the state courts have erred, the proper forum for appeal is the United States Supreme Court." (*Aristocrat Health Club of Hartford v. Chaucer*, 451 F.Supp. 210, 218 (D. Conn. 1978).) Where a state court sustains the validity of the state statutory system, the party has final recourse to the United States Supreme Court. (*Juidice v. Vail*, 430 U.S 327, 337 fn. 14 (1976).)

1. This Supreme Court Should Determine Whether Governmental Action Which Exceeds the Scope of an Abatement Warrant Stemming from a Nuisance Abatement Resolution Constitutes a Regulatory Taking or an Actual Taking.

This Petition should be granted because the Court of Appeal's classification of the City's actions in this case as a "regulatory taking" conflicts with authority from this Supreme Court. The governmental action here was not a regulatory taking but, rather, was an actual or physical taking because the City exceeded the scope of the resolution and subsequent abatement warrant by seizing and damaging property after the warrant had expired and by taking personal property which was not located on the subject real property. The opinion, and especially the trial court ruling and arguments advanced by the City, demonstrate the law concerning that which does and does not

constitute a "regulatory taking" remains unsettled around the nation.

The City has continued to contend any act which could arguably find its genesis in some ordinance or resolution passed by a city council is insulated from inverse condemnation actions unless there is a prior petition for a writ of mandate. The trial court accepted this view, but then later, during the actual trial, finally appeared to understand the Robertson's theory of recovery, although it was too late by that time. The Court of Appeal continued to apply the concept of regulatory taking in a fashion which is both overly broad and inconsistent with prior pronouncements from this Supreme Court.

The California Supreme Court itself has recently elaborated on the definition of a regulatory taking in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), as follows:

> "When property is damaged, or a physical invasion has taken place, an inverse condemnation action may be brought immediately because an irrevocable taking has already occurred. If the alleged taking is a 'regulatory taking,' i.e., one that results from the application of zoning laws or regulations which limit development of real property, however, the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking." (*Id.* at 13.)

Therefore, if an inverse condemnation action concerns a "regulatory taking," then a plaintiff generally must first pursue a writ of mandate before initiating an inverse condemnation action. If it is not a "regulatory

taking," then that is not required. Here, the Robertsons were suing the City because it damaged their property by bulldozing the building, taking the tires, taking the rims, taking the tire racks and taking all the other items remaining on the property. The Robertsons were also specifically suing the City for damaging and destroying the business goodwill of Imperial Tire.

These are not "regulatory takings" because the Robertsons were not challenging the requirements of Resolution 5009 itself but brought this action seeking compensation for the City's acts of taking, damaging and destroying property during a time when the abatement warrant was not in effect and on real property not covered by either Resolution 5009 or the abatement warrant.

To determine whether there is a regulatory taking, the *regulation* itself must be analyzed to determine whether *the regulation* "goes too far." It is not the government's subsequent action which is to be analyzed to see if that subsequent action "goes too far" for purposes of determining whether or not there was a regulatory taking. The analysis must focus on the regulation itself. The City's subsequent acts are not part of the determination of whether or not there is a regulatory taking.

This is so not only under the language of this Supreme Court's previous opinions, but also when one examines the mechanics of these situations. A city or other governmental body will pass a resolution or ordinance. A property owner must at that time decide whether to challenge the resolution or attempt to comply with it. It is at the time the resolution is passed that that decision is made, and it is the resolution or ordinance itself a court will examine in a mandamus proceeding, not the subsequent action which may or may not have been undertaken by the City.

The Court of Appeal justified the City's action here by relying, in part, on this Supreme Court's decision in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). (App. 9.) However, the California court misconstrued and misapplied *Goldblatt*. There, this Court explained: "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." (*Id.* at 592.) The issue in the instant case was whether or not *exceeding the scope* of the resolution and the warrant could constitute a valid exercise of police power. That was not a "given." It was the issue to be tried. However, the Robertsons never were afforded a trial on this point. Therefore, *Goldblatt* can not be controlling here.

Over one hundred years ago this Court noted one of the differences between a taking which must be compensated and proper nuisance abatement under the police power was: "In one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." (*Mugler v. Kansas*, 123 U.S. 623, 669 (1887).) In the instant case, the "unoffending" property which was taken from the Robertsons was the personal property on the adjoining parcel of land which was not the subject of either Resolution 5009 or the abatement warrant. The governmental action at issue here would not be insulated from a takings claim because it was not necessary to the abatement of the nuisance.

Furthermore, this Supreme Court has noted: "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).) It does not matter that the

Robertsons still have their real property. What matters is that some of their property was taken by the government.

Additionally, in *Penn Central*, this Court noted: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government. . . . " (*Penn Central, supra*, 438 U.S. at 123.) Here, the City did not enact a resolution which was aimed at abating a nuisance; it went on to an adjoining parcel of land and physically took property. Additionally, Chief Justice Rehnquist has noted: "The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others." (*Penn Central, supra*, 438 U.S. at 145, Rehnquist J., dissenting.) The personal property on the adjoining property was not the subject of Resolution 5009 or the abatement warrant because it did not pose a danger to anyone. Therefore, the City's action was not immunized from inverse condemnation liability by the police power.

In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), this Supreme Court invalidated a zoning ordinance, explaining: "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." (*Id.* at 188.) So, too, in the instant case the public benefit, necessity and justification for the abatement procedure was defined by both Resolution 5009 and the abatement warrant. Actions by the government which exceeded the scope of the resolution and the warrant exceeded, by definition, the scope of the regulation and, therefore,

exceeded the scope of the City's police power to abate the nuisance.

Therefore, the acts of physical taking of property alleged in the complaint did not constitute a "regulatory" taking. Instead, those acts constituted a "plain" taking requiring compensation and which did not have as a prerequisite the requirement the Robertsons seek a writ of mandate. The Court of Appeal's opinion is contrary to the authority set forth by this Supreme Court as to what is and what is not a regulatory taking and what is and what is not an authorized act to abate a nuisance under a municipality's police power. There is confusion among the lower courts and a divergence of authority on this important point of Constitutional law which must be resolved by this Supreme Court.

2. This Supreme Court Should Determine Whether California's Requirement a Property Owner Pursue a Petition for Writ of Mandate as a Prerequisite to an Inverse Condemnation Action Constitutes a "Reasonable, Certain and Adequate Provision for Obtaining Compensation" if the Property Owner is Challenging the Manner in which a Municipality Implemented a Nuisance Abatement Resolution Rather than the Terms of the Resolution Itself.

Whether or not this Supreme Court grants certiorari on the first issue presented, it should grant certiorari on the question of whether or not a property owner can be required to pursue a writ of mandate challenging the terms of a municipal ordinance or resolution such as Resolution 5009 when the property owner is not challenging the terms of the ordinance itself. That requirement is contrary to both logic and this Supreme Court's governing authority.

The Robertsons are challenging the manner in which the City implemented Resolution 5009 and contending the City thwarted their efforts to comply with the resolution. Therefore, there was no need for them to seek judicial review of the resolution, and that requirement was irrelevant to the facts of this case. Requiring compliance with such a provision is only required when "the state system provides appropriate means for seeking compensation." (*Rivervale Realty v. Town of Orangetown, N.Y.*, 816 F.Supp. 937, 943 (S.D.N.Y. 1993).) That requirement is not appropriate here because Robertsons were not challenging the terms of Resolution 5009. Interposing an irrelevant requirement a writ of mandate be pursued to challenge the terms of the resolution as a prerequisite to bringing an inverse condemnation action in this case does not meet the requirement of *Williamson* and related cases that the state provide a "reasonable, certain and adequate provision for obtaining compensation." Therefore, California's requirement such a procedure be followed in cases such as are presented here works a violation of the Fifth and Fourteenth Amendment rights held by the Robertsons and all other property owners similarly situated.

This petition should be granted because lower courts require guidance as to exactly what constitutes a "reasonable, certain and adequate provision for obtaining compensation" and what does not. One commentator has referred to the different states' treatment of this question as a "crazy quilt pattern of treatments of the issue . . . , some offering more protection to property owners than federal law offered, others less." (9, *Thompson on Real Property*, § 81.06, p. 273 (1994).) In order to set a uniform standard as to the degree of protection states must offer to property owners, this petition should be granted.

The decision of the California court in the instant case conflicts with the result and analysis of the recent case of *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694 (6th Cir. 1996), in which that court examined Ohio's procedure regarding inverse condemnation actions and found that procedure constitutionally inadequate, stating: "We hold that Ohio affords no 'reasonable, certain and adequate provision for obtaining compensation' after private property is taken by public authorities. . . . " (*Id.* at 700.) The court further held:

> "The fact that the State's courts recognize an action in mandamus, where the State has no mandated procedures governing inverse condemnation, cannot be equated to a 'reasonable, certain and adequate provision for obtaining compensation,' after the property has been physically taken in violation of the appropriations statutes. An action for the extraordinary writ of mandamus is, at best, a procedure which must be invoked in the absence of any statutory framework in an attempt to obtain wholly equitable relief for an injury already inflicted." (*Ibid.*)

So, too, in the instant case the injury to the Robertsons had already been inflicted. They were challenging the manner in which the City had implemented Resolution 5009 and further contended the City had actually thwarted their efforts to comply with the resolution. Therefore, the remedy of mandamus was constitutionally inadequate in this case as well.

The courts of different jurisdictions around the nation are applying these principles in a disparate and "crazy quilt" pattern. This Court should grant this petition so that it can set forth definite standards as to state procedures are and are not permissible under the Fifth

and Fourteenth amendments, as well as under *Williamson* and its progeny.

As for the specific facts of this case, the Court of Appeal's opinion dismissed Robertsons' argument in this regard with the explanation petitioners could have pursued a petition for writ of mandate to challenge the City's failure to act in accordance with its own ordinance. (App. 13-14.) The problem with this reasoning is two-fold. First, the Robertsons were still attempting to comply with the ordinance by submitting revised plans up through the time the abatement warrant issued and was carried out. They had no reason to seek mandate as they were still attempting to comply with the resolution. Resolution 5009 declared the property a nuisance and gave the Robertsons two options: submit plans and repair the building *or* the building would be torn down. The Robertsons chose to comply with the resolution and submit plans. There was no need to seek a petition for writ of administrative mandamus at that time because they felt they could comply with Resolution 5009's terms.

More importantly, by the time the City and its agents had bulldozed the building and had taken the personal property from the neighboring parcel of land, the deed was done. The "taking" had been completed. There would no longer be any reasonable or effective remedy resulting from pursuing a writ petition.

It is interesting to note at the later trial the court mentioned several times the actions taken by the City after passage of the resolution would not be affected by a ruling the Robertsons were foreclosed from litigating the question of whether the City improperly prevented them from complying with Resolution 5009. At one point during the trial when the issue of the City's rejection of the

plans came up and counsel for the City objected, the court noted:

> "The Court: 'All right. So his theory appears to be that the administrative order just told him to get the plans, and he got plans in; that the plans, however – it took the City an excessive amount of time to find out what was wrong with them; and then when they did find out what was wrong, and gave the plans back to him for revision, that he had the revisions made and turned them back in as soon as he could, within a reasonable time after the city gave the plans back to him.' " (RT 436-438.)

After further discussion, the court then sustained the City's objection to this evidence "on the ground that whether or not you had the plans revised by the time that this matter was before the court for the issuance of the warrant is irrelevant." (RT 439.)

At another sidebar conference the court stated:

> "Well, I'm prepared, certainly to agree that the propriety of the administrative order that is in evidence is res judicata, but whether or not he was – I don't think that there is any evidence that there's been any kind of an administrative adjudication binding upon him in res judicata that he was not prevented by the city from complying with the provisions of that administrative determination.
>
> "And here in the letter [Ex. R-17] he seems to say that although there's a finding that he failed to submit plans, he has tried to submit them, but the city has not accepted them. This would appear relevant, to me, relevant to the issue of whether or not he was prevented from complying with the administrative order by the City's refusal to accept his plans. Objection is overruled." (RT 445.)

These discussions exemplify the problems with the unsettled nature of the law in this area. The gravamen of the Robertsons' complaints arose *after* the passage of Resolution 5009. The trial court's rulings in this regard are inconsistent, and the Court of Appeal's opinion conflicts with the controlling law from this Supreme Court.

Finally, fairly included within this question is the issue of whether or not the Robertsons were precluded from pursuing tort claims against the City and its employees. On January 6, 1994, the trial court summarily adjudicated the tort causes of action against the Robertsons on the basis "Plaintiff[s] have only one cause of action for the damage done to their property, no matter how many names they give to it. Plaintiffs cannot recover from the City defendants for such damage under ANY THEORY because they did not comply with procedural requirements that afforded the City the opportunity to rescind or modify its action rather than become liable for payment of compensation." (App. G; AA 1053.) Because the trial court based its summary adjudication of the tort causes of action on the same underlying theory on which it adjudicated the inverse condemnation causes of action, the question of the continuing viability of tort theories as an alternate ground of relief is fairly included in this issue.

Also fairly included within this question is the issue of whether or not California courts can dispose of cases such as this in summary proceedings or whether a property owner must be permitted a trial on the question of whether the municipality's actions were reasonable and whether the municipality acted in accord with the scope of the resolution under the specific facts of each case.

CONCLUSION

Because the procedures employed by the State of California do not meet the constitutional requirement as enunciated by this Supreme Court that there be in place a "reasonable, certain, and adequate provision for obtaining compensation," the California courts' decisions conflict with the decisions of this Supreme Court, as well as with the Constitution itself. In order to resolve this conflict of national importance, this petition for writ of certiorari must be granted.

Respectfully submitted,

Dated: May 15, 1997

JOHN L. DODD
Attorney for Plaintiffs and Petitioners Dale and Christine Robertson

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DALE ROBERTSON et al., Plaintiffs and Appellants, v. CITY OF SOUTH GATE et al., Defendants and Respondents.	B083784 (Super. Ct. No. BC062077) (Filed Dec. 9, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Yaffee, Judge. Affirmed.

Law Offices of John L. Dodd, John L. Dodd and Ann Qushair for Plaintiffs and Appellants.

Richards, Watson & Gershon, Gregory M. Kunert, Gary E. Gans, Frye & Alberts, John N. Frye and Jeffrey A. Katz for Defendants and Respondents.

The plaintiffs own commercial property that was severely damaged by fire. After several government agencies determined that the damaged structure posed a danger to public safety, the City of South Gate adopted a resolution directing the cleanup of debris on the property and the submission of building restoration plans. After the plaintiffs failed to abide by the terms of the resolution, the City obtained an abatement warrant from the municipal court and razed the property. The plaintiffs

then sued on various grounds, including inverse condemnation. In a piecemeal fashion (by motion to strike, demurrer, summary adjudication of issues and jury trial), all of plaintiffs' claims were ultimately rejected. We affirm the judgment.

FACTS

The Robertsons are the owners of a commercial tire business on Imperial Highway in the City of South Gate (the City). The business was damaged by an electrical fire in September of 1990. The Robertsons claimed that the fire "damaged the roof, garage doors, and the equipment located in the structure, but caused only minimal damage to the concrete block walls which constituted the bulk of the structure." The family continued to operate their business in the damaged structure even after the City instructed them to refrain from doing so. An inspection by the state Division of Occupational Safety and Health (DOSH) in December of 1990 resulted in citations because substantial fire damage to the walls and structure was found to pose a threat to employees and the general public.

Soon after the fire, City officials inspected the site and decided that the damage to the structure exceeded 50 percent of the cost of replacing it. The City's determination prevented the Robertsons from rebuilding the structure as it previously existed due to changes in municipal zoning ordinances. The Robertsons disagreed with the City's determination and insisted that the structure was less than 50 percent damaged by the fire. They gave the City six construction company estimates plus a damage

assessment report from fire damage expert Milton Inbody. Each of the estimates and reports submitted by the Robertsons claimed there was less than 50 percent damage to the structure.

In January of 1991, the City revoked the Robertsons' certificate of occupancy and demanded that they cease operations. The City cited the DOSH inspection which had found the structure unsafe. The City also suspended the Robertsons' business license on January 25, 1991. Despite the suspension, the Robertsons applied for and received a business license in June of 1991. The family then resumed business operations. Within a month, Dale Robertson was cited four times for doing business without a license. When he appeared in court on the citations, he was jailed pending posting of bail. The charges were subsequently dismissed. On July 26, 1991, the City issued an order to vacate the property due to its unsafe condition.

A public hearing was held on August 12, 1991, 11 months after the fire, to determine the fate of the Robertsons' property. Following the submission of evidence and testimony from the Robertsons and other interested parties at the hearing, the South Gate City Council adopted Resolution Number 5009 (the Resolution) on August 26, 1991. The Resolution includes certain findings of fact. Among them are the following: (1) The Robertsons' property abuts residential properties and was damaged during the fire to the extent that one wall was destroyed and two other walls were partially damaged; (2) The City sent numerous letters to the Robertsons demanding that the structure be repaired, restored or demolished, but no plans for rebuilding the property were submitted and the

City's requests to inspect the property were refused; (3) An investigation secured through an inspection warrant revealed that the roof of the structure was totally demolished, leaving 16-foot-high masonry walls without sufficient lateral support. Some of the masonry blocks had separated due to the inadequate bracing. Moreover, the property was strewn with debris, including used vehicle tires, furniture and flammable liquids, which could cause a second fire; (4) A structural engineer who inspected the structure recommended immediate demolition or bracing because a strong wind or moderate earthquake could cause the walls to collapse, thereby endangering the lives and safety of people in adjacent residential properties and on public rights-of-way; (5) The City Fire Department found the structure unsound and that the property constituted a fire hazard due to combustible debris and the use of temporary extension cords for electrical wiring; and (6) The City Health Department found that the toilet facilities on the property were damaged and needed repair to prevent waste water leakage.

Based on these findings, the City Council determined that the Robertsons' property constituted a public nuisance in that it was a fire hazard, was unfit for use as a business, and posed a structural hazard to neighboring residents and to passing pedestrians. These factors made the property injurious to public health, safety and welfare, the City concluded.

The City Council ordered the removal of debris, tires, combustible material, flammable liquids and toilet facilities within 7 days. It also ordered the submission within 15 days of complete plans for the restoration of the building. The plans had to establish that restoration could be

safety [sic] accomplished. Upon approval, the Robertsons would have 60 days to restore the structure. If these time periods were not met, the Robertsons were required to demolish the structure within 10 days of any default. The Resolution also states that if the Robertsons failed to abate the nuisance, the City Department of Building and Safety was directed to cause the nuisance to be abated by clearing the property and razing the walls, the cost of which had to be paid by the Robertsons.

Following passage of the Resolution, Dale Robertson had numerous run-ins with the City police department. On August 15, 1991, he was cited twice for not vacating the property, though he claims to have been standing on the sidewalk at the time, not on the property. On August 20, he was cited while picketing in front of his property.

The Robertsons submitted plans which were returned by the City for corrections on September 27, 1991. Five weeks went by and no corrections were made. The Robertsons asked fire damage repair expert Mr. Inbody to make the corrections so that the plans could be resubmitted, but failed to inform Inbody that there was any deadline. By October 1991, the City concluded that the Robertsons had failed to comply with the terms of the Resolution, and the City prosecutor applied for an abatement warrant from the municipal court. A court hearing was held on the application for an abatement warrant on October 30, 1991. Corrected plans for reconstruction were not submitted until the day of the court hearing, well beyond the deadline specified in the Resolution.

At the hearing on the application for an abatement warrant, the court initially contemplated a schedule that

would give the Robertsons a final opportunity to obtain a building permit and start construction, with completion of construction to be accomplished by February 2, 1992. However, Dale Robertson orally indicated to the court that his schedule would be dictated by a "small voice" and prayer rather than by court order. The court observed that it was under a duty to follow the laws, as was Mr. Robertson. After Mr. Robertson stated that the only thing that could move the tires stored on the property was a bulldozer, the court decided that the Robertsons had no intention of making a good faith effort to comply with the Resolution, and abandoned its attempt to allow the family additional time to reconstruct. The court then signed the abatement warrant. The warrant commanded the City to enter the Robertsons' property, demolish all structures, remove all debris including combustible material and toilet facilities, and "clear the property."

The City's demolition contractor began abating the nuisance on November 6, 1991. The abatement warrant was extended by the court for 10 days on November 14, 1991. That same day, Mr. Robertson was arrested for interfering with the police. He had been protesting that the abatement warrant expired on November 13, and the workers had no right to be on his property. The extension on the warrant was not obtained until later in the day, after the arrest. The charges against him were subsequently dismissed because the abatement warrant had expired at the time he was arrested.

The Robertsons sued the City and a number of its employees in an inverse condemnation action filed on August 13, 1992. The trial court struck portions of the

first amended pleading on January 20, 1993, on the grounds that the Robertsons had failed to challenge the City's administrative actions by suing in mandamus, a prerequisite to an inverse condemnation action. Plaintiffs then filed a second amended complaint. The City's demurrers to the new pleading were sustained with leave to amend. The third amended complaint asserts claims for inverse condemnation, conversion, interference with business advantage, trespass, false imprisonment, spoliation of evidence, violation of civil rights, and malpractice (against Milton Inbody).

The defendants asked the trial court to summarily adjudicate certain of the Robertsons' claims. The court ruled in the City's favor on all but the false imprisonment claim. Inbody's motion for summary judgment on the malpractice claim against him was denied. The false imprisonment and malpractice claims were tried to a jury, which rendered a verdict in favor of the defendants. In a special verdict, the jury found that Mr. Robertson was imprisoned against his will, but that the arrest was lawful. The jury also found that defendant Inbody used the knowledge and skill ordinarily required of someone in his field, thus he was not liable for malpractice. Judgment was entered for the defendants on February 15, 1994. This appeal was filed on April 15, 1994.

DISCUSSION

1. Rulings on Inverse Condemnation Claims

The first five causes of action in the original complaint are for inverse condemnation. Plaintiffs claim they are entitled to just compensation under the state and federal constitutions for the damage and destruction of their real and personal property by the City and its employees. The trial court dismissed the inverse condemnation claims on the City's motion for summary adjudication.

A brief overview of the area is helpful. " 'Eminent domain is the right of the people or government to take private property for public use.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 3.) " 'An inverse condemnation action is an eminent domain initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Id.* at p. 377, fn. 4.) Apart from applying to the government's taking of property for public use, the just compensation requirement has been extended, in a limited manner, to government regulations which deny landowners all economically beneficial or productive use of their land and are the functional equivalent of condemnation. (*Id.* at p. 377, fn. 5.)

One of the central disputes between the parties is whether or not the Robertsons were required to pursue a writ of mandate challenging the Resolution before they could sue for inverse condemnation. The City argues that the Robertsons' failure to challenge the Resolution by

way of a timely writ petition bars their inverse condemnation claims under res judicata principles. The plaintiffs maintain that no writ was required because (a) the Resolution was not a "regulatory taking" or (b) they are attacking misconduct which occurred after the Resolution was adopted or (c) filing a writ petition would have been futile.

a. The City Was Regulating the Property

The government may regulate property as part of its police power when reasonably necessary to " 'protect the order, safety, health, morals and general welfare of society.' " (*Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.) The government has no constitutional duty to compensate property owners for pecuniary losses sustained when they are forced to cease an activity which is injurious to the community. (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 593.) Just compensation is appropriate only where the government is disturbing a landowner in the *lawful* use of his property; the theory does not apply when the government stops a landowner from an unlawful or noxious use of the property which threatens public safety. (*Ibid.*) Thus, "[i]f the court determines that the public entity was reasonably exercising its power to regulate use of property rather than its power of eminent domain when it took or damaged the property, no compensation may be recovered." (Matteoni & Veit, Condemnation Practice in California (2d ed. 1996) § 16.2, p. 698.)

Abatement of a nuisance is one example of governmental regulation by exercise of the police power: "The

abatement of a public nuisance pursuant to a reasonable exercise of the police power does not require the payment of compensation at all." (*People* ex rel. *Dept. of Transportation v. Hadley Fruit Orchards, Inc.* (1976) 59 Cal.App.3d 49, 53; *People* ex rel. *Dept. of Transportation v. Desert Outdoor Advertising, Inc.* (1977) 68 Cal.App.3d 440, 448.) In the case of a dangerous structure, "When a property owner has been given ample notice and opportunity to correct or repair a structure constituting a nuisance, but has failed to do so, a demolition of the structure by the government to abate the nuisance is a regulatory action within the police power, not a taking of property which requires compensation of the owner." (*Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1358.) The government need not wait until the public has suffered actual injury before it can act; it may take reasonable steps to protect the public where a substantial hazard is created. (*Freeman v. Contra Costa County Water Dist., supra,* 18 Cal.App.3d 404, 408-409.)

Exercise of the police power requires that affected individuals be afforded due process protections; i.e., notice and an opportunity to be heard before possessions are taken or property destroyed. (*Traverso v. People* ex rel. *Dept. of Transportation* (1993) 6 Cal.4th 1152, 1161-1162.) No claim is made in the complaint that the Robertsons were not afforded a hearing before the City made its determination. Indeed, according to the allegations in the complaint, there were three hearings: two before the city council (August 12 and 26, 1991) and one before the municipal court issued the abatement warrant (October 30, 1991). The Robertsons received all the process they

were due before the City enforced public safety regulations. (Compare *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 716, in which a municipality took summary action to enforce a resolution directing the abatement of a public nuisance without first holding a hearing or seeking a court determination.)

In sum, this is a clear-cut case of government regulation through exercise of the police power. The City was not taking the Robertsons' property "for public use," nor was the City placing conditions on the use of the land which deprived the Robertsons of all benefit. (*Customer Co. v. City of Sacramento, supra,* 10 Cal.4th at p. 377.) Rather, by adopting the Resolution after giving notice and conducting a public hearing at which testimony and evidence were introduced, the City was administering its duty to regulate public safety and welfare by ordering that the Robertsons submit acceptable reconstruction plans and remove flammable and other debris, otherwise the property would have to be demolished. "There was no 'taking' here, because appellant is still free to make any lawful use of his land and is merely prohibited from maintaining a nuisance on it." (*Duffy v. City of Long Beach, supra,* 201 Cal.App.3d at p. 1359.)

A regulatory taking may occur when the government, in the exercise of its police power, adopts or enforces a regulation that goes too far. (*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1169.) The appropriate avenue to challenge the adoption or enforcement of the Resolution was through a petition for a writ of mandate, not by a separate action for inverse condemnation, because the City was exercising its police power to regulate property for public safety reasons. The

Robertsons cannot convert their attack on the Resolution into an inverse condemnation claim by declining to avail themselves of the procedures available under Code of Civil Procedure section 1094.5 for reviewing discretionary governmental administrative decisions. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19-20.) Failure to seek timely review in mandamus protects the government decision from collateral attack and bars a subsequent civil action under res judicata principles. (*Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607-608; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1493.)

To underscore the untimeliness of the Robertsons' challenge to the Resolution, the Robertsons allowed the Resolution to form the basis of the municipal court's abatement warrant. Had prompt mandamus review of the Resolution been sought by the Robertsons, the abatement warrant might have been forestalled. Instead, the Robertsons continued to sit on their rights even after the court commanded the demolition of their property. Not until August of 1992 did the Robertsons urge that the entire basis for the demolition was faulty. By then, of course, it was far too late: the property had been cleared nine months earlier pursuant to the judicial abatement warrant.

b. Attack on Conduct Occurring After Adoption of the Resolution

The Robertsons contend that they were not required to seek review in mandamus because they are not challenging the Resolution itself but only conduct that

occurred after the City adopted the Resolution.[1] They characterize the gravamen of their complaint as being " '[w]hether the Robertsons complied with Resolution 5009 by submitting new plans;' '[w]hether the City's processing of the new plans was reasonable and within the scope of Resolution 5009;' '[w]hether the City and C.L. Taylor Wrecking Company went outside the scope of Resolution 5009 in seizing and destroying Robertson's property;' and '[w]hether the City's actions after adoption of Resolution 5009 violated plaintiffs' civil rights.' "

The Robertsons' complaints about the City's alleged failures to comply with the terms of its own Resolution, or to act reasonably in carrying out the Resolution, were reviewable in mandamus. "The failure of a local agency to act in accordance with an applicable ordinance or regulation is subject to challenge in an administrative mandamus proceeding." (*Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1226; *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 644-646. See also *City of Los Angeles v. Superior Court* (1995) 40 Cal.App.593, 599-600; property owners' claim that the city to follow its own laws when approving or

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[1] This limitation is not evident from an examination of the complaint. Most of the factual allegations in the complaint concern the dispute over the extent of the fire damage; the repair estimates submitted by the Robertsons to the City; the events leading up to the hearing before the City Council; the manner in which the Resolution was adopted; and the correctness of the City's 50 percent damage finding which underlay the Resolution. These allegations are incorporated by reference into the causes of action for inverse condemnation.

rejecting their plans to rebuild their fire-damaged businesses was reviewable in mandate.) A city's failure or refusal to follow its own rules may give rise to a claim that it did not proceed "in the manner required by law." (Code Civ. Proc., § 1094.5, subd. (b); *Jackson v. City of Pomona* (1979) 100 Cal.App.3d 438, 451).

As to the Robertsons' claim that City employees went beyond the scope of the Resolution in seizing and destroying the Robertsons' property, this is not a constitutional takings claim. Mere carelessness by public employees in performing their duties does not amount to a taking of another's private property for a public use. (*Neff v. Imperial Irrigation Dist.* (1956) 142 Cal.App.2d 755, 758.) The takings clause "never was intended, and never has been interpreted to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property." (*Customer Co. v. City of Sacramento, supra,* 10 Cal.4th at p. 378.) Rather, property damage incidentally caused by public employees in pursuit of their public duties gives rise only to an action brought under the Government Tort Claims Act. *(Ibid).*

Finally, the Robertsons' claim that the City violated their civil rights by wrongly imprisoning Mr. Robertson and by destroying their property similarly fails as an inverse condemnation cause of action. The destruction of their property pursuant to the abatement warrant may have been actionable as a tort, if it was actionable at all. It is dubious that anything done pursuant to the abatement warrant is actionable inasmuch as that order was never appealed nor a writ taken to prevent its enforcement; it is

res judicata. Moreover, the jury found against the Robertsons on their false imprisonment claim.

c. Futility of Seeking Review

The Robertsons assert that it would have been futile to seek mandamus review because the City "repeatedly rejected acceptable plans and made unnecessary and burdensome demands upon the Robertsons for further modification." Judging by their argument, it would seem that the Robertsons have confused the legal concepts of exhaustion of administrative remedies and administrative mandamus. The law did not require that the Robertsons seek further administrative review from *the City;* rather, it required that they seek *judicial* review of the City's administrative action by way of a writ petition. The cases the Robertsons cite are inapposite because they involve the futility of seeking review from the same governmental entity which they are fighting. This rule does not apply when review is being sought from the superior court, whose role it is to judge whether the government is acting reasonably. (Code Civ. Proc., § 1094.5)

In sum, the Robertsons failed to state a cause of action for inverse condemnation. At most, the facts alleged in the complaint show an exercise of the police power to abate a public nuisance, not a taking of property for public use. The adoption and enforcement of the Resolution was not aimed at taking the Robertsons' property for public use. The City's physical destruction of the structures and impoundment of personal property on Robertson's land – which was compelled by Robertson's intransigence and by court order – did not transform the

City's conduct into something other than regulatory action under the police power. A petition for a writ of mandate was a necessary means of obtaining review of the City's actions, but this the Robertsons failed to do and the adoption and enforcement of the Resolution are now res judicata.

2. Liability of the City's Demolition Subcontractor

The trial court sustained without leave to amend the demurrer of C.L. Taylor Wrecking Company to the seventeenth cause of action for conversion and trespass in third amended complaint. Taylor was the demolition contractor hired by the City to execute the abatement warrant. The Robertsons argue that Taylor should be held liable because the wrecking company acted after the abatement warrant expired on November 14 (before the court extended the warrant) and because the company removed items from an adjacent property that were not specified in the warrant.[2]

The Robertsons' first point is not convincing. Even if it is true the wrecking crew entered the property on November 14 some hours before the municipal court extended the abatement warrant, the Robertsons cannot show Taylor damaged them by doing so. It made no difference whether Taylor worked on November 14 or not; the abatement order directed that the property be "cleared" and it was cleared, down to the dirt. Nothing would have altered the final result even if Taylor had refrained from working on November 14. Moreover,

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[2] C.L. Taylor has not filed a respondent's brief.

because the court extended an existing warrant, the extension was retroactive.

As to the second point, a demolition contractor hired by the government cannot be held liable for damage to the property being demolished or adjacent property. " ' "If the contractor follows the plans and specifications furnished by the public agency, and damage results to the adjacent property, the public agency and not the contractor is liable." ' " (*Leppo v. City of Petaluma, supra,* 20 Cal.App.3d 711, 719.)

The third amended pleading alleges that Taylor "was directed by the City of South Gate to remove certain properties from the business property. While accomplishing this activity, employees of C.L. Taylor Wrecking Company entered onto the adjacent south property" not encompassed by the Resolution and removed or destroyed personal property and inventory owned by the Robertsons. In addition, the wrecking company allegedly removed or destroyed items on the property being razed that were not specified in the Resolution or the abatement order.

It cannot be discerned from the face of the complaint whether Taylor failed to follow plans or specifications provided to it by the City. The property Taylor removed or destroyed may well have been covered by plans and specifications given to it by the City. We know that Taylor was directed by the City to enter the Robertsons' property, but we do not know what Taylor was directed to do after entry. We do not know if Taylor was given the Resolution or abatement warrant. This defect in the pleading was not cured after several attempts to amend

by the Robertsons. No request for a further opportunity to amend appears in the record on appeal. In fact, no opposition to the demurrer appears in the record, other than an objection that notice was improperly served. Absent evidence of a request to amend, it cannot be said that the trial court abused its discretion by sustaining the demurrer without leave to amend considering that the Robertsons had already made three prior unsuccessful attempts to generate a pleading sufficient to withstand demurrer.

4. Trespass and Conversion Claims Against the City

The Robertsons alleged that the City and its employees wrongfully entered on the Robertsons' property, caused physical damage, and converted the property to their own use. The City argued in a motion for summary judgment that its independent contractor, C.L. Taylor Wrecking Company, entered the property and abated the nuisance pursuant to the abatement warrant. The City contended that it was not liable for the acts of its independent contractor. *(O'Gan v. King City Joint Union High School Dist.* (1970) 3 Cal.App.3d 641, 646.) Further, the City argued, there was no evidence presented that any conduct in entering the property and impounding items found there was not properly done in connection with the abatement warrant.

At the hearing on the motion, the Robertsons indicated to the trial court that they had no objections to anything relating to these particular causes of action, whereupon the court granted the motion. Thus, the Robertsons have waived any objection to the ruling on

appeal. Even if they have preserved the argument, the City's contention is well taken that the actions of the City and its demolition contractor were performed pursuant to the abatement warrant. The warrant commanded the City to "clear the property" and remove "all debris, tires, rims, combustible material" and so on. The warrant itself was issued pursuant to the Resolution, which is res judicata as discussed above. The Robertsons cannot now complain that the City or its contractor wrongfully entered their property and removed things from it when that is exactly what the municipal court commanded the City to do.

5. False Imprisonment Claim

The jury rejected the Robertsons' claim against the City for false imprisonment by finding in a special verdict that the City's police officers lawfully arrested Mr. Robertson. On appeal, the Robertsons invoke the doctrine of res judicata and argue that the City is liable to them as a matter or law. The argument was not made in the trial court. In addition, the Robertsons contend that the police had no reasonable cause to believe the arrest was lawful.

The Robertsons' res judicata argument is premised on the dismissal of criminal charges after Mr. Robertson was arrested on November 14, 1991. Because the charges were dismissed, they reason, the City is collaterally estopped from maintaining that the arrest was lawful. They are, in other words, attempting to use the collateral estoppel doctrine offensively as a sword, rather than defensively as a shield. Offensive use of collateral estoppel was conditionally approved by the Supreme Court in *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322. The high court

observed that offensive use of collateral estoppel (a) does not promote judicial economy in the same manner that defense use does and (b) is potentially unfair to a defendant who may have had little incentive to vigorously litigate the prior action giving rise to the estoppel because later litigation was unforeseeable. Because of these problems with offensive collateral estoppel, the court wrote, the trial court must be permitted to exercise broad discretion to determine it is fair to apply the rule in a given case (*Id.* at pp. 329-331. Accord: *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 905-906; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 942).

We agree with the court's analysis in *Parklane Hosiery.* Had offensive collateral estoppel been asserted below, the trial court in this instance could have conducted an inquiry to determine whether the dismissal of criminal charges was a fully litigated issue. It appears that the court which dismissed the criminal charges against Mr. Robertson pursuant to Penal Code section 995 may have been unaware that there was an order to vacate the property as well as an abatement warrant, and no officers testified to clarify why Mr. Robertson was arrested. It is not even clear whether any officers were present at the hearing at which the criminal charges were dismissed. For this reason, we cannot entertain the Robertsons' request to decide the false imprisonment claim as a matter of law using offensive collateral estoppel. The point should have raised before the trial court to allow it to exercise its discretion. *Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at pp. 329-331.)

The Robertsons' second point concerning the resolution of the false imprisonment claim is that the police

lacked probably cause to arrest Mr. Robertson. In the context of an action for false imprisonment, whether there is probable cause for a detention "is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense. . . . " (*Collyer v. S.H. Kress & Co.* (1936) 5 Cal.2d 175, 181; *Allen v. McCoy* (1933) 135 Cal.App. 500, 507-508.)

The record discloses that the Robertsons' property was the subject of an order to vacate due to hazardous conditions. The order to vacate, which is dated July 26, 1991, reads, "All persons are immediately ordered to vacate the subject property and not enter upon same until such time as the City of South Gate, Department of Building an[d] Safety, determines the unsafe conditions at the subject property have been corrected or removed." The trial court took judicial notice of the order to vacate and City ordinances pertaining to its effect.

The Robertsons become aware of the order to vacate when a notice was posted, and they were cited for violating the order in August of 1994. Mr. Robertson had permission to enter the property to abate the nuisance. However, he testified during his deposition that he did not enter the property on November 14, 1994, to abate the nuisance. The officer who arrested Mr. Robertson that day first asked Robertson if he was aware of the order to vacate. Robertson said yes, he knew of it. He was then asked if he realized he would be arrested if he remained on the property, and he replied that he was not going to let the City crew onto the property. He was then arrested. Given these facts, there was probable cause for the police

to detain Mr. Robertson for violating the order to vacate the property.

6. Bifurcation of Trial

On the City's motion, the trial court bifurcated the trial into two phases: first the false imprisonment claim against the City, then the malpractice claim against Milton Inbody. On appeal, the Robertsons urge that they were prejudiced by the bifurcation. They do not challenge the sufficiency of the evidence in support of the jury's verdict in favor of Inbody.

As the Robertsons acknowledge, the trial court has discretion to bifurcate causes of action, and to order separate trials for separate defendants. The exercise of that discretion will not be disturbed on appeal absent a manifest abuse. (Code Civ. Proc., § 1048; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271; *Fisher v. Superior Court* (1958) 157 Cal.App.2d 126, 130.) In this instance the court reasoned,"If the only matter that you [the Robertsons] are going to trial on against the City defendant is the false arrest case, then all of the rest of this stuff that is in issue with Inbody would not be admissible against the City."

The Robertsons fail to demonstrate that they were prejudiced by the court's decision to bifurcate, or that it was an abuse of discretion. First, they point to the purported "loss" of certain expert testimony presented in the second phase of the trial, but not the first; specifically, there was testimony from Inbody and Inbody's expert that the City imposed unreasonable requirements on the Robertsons' reconstruction plans. There was good reason

for excluding this testimony from the first phase of the trial: the reasonableness of the building requirements the City place on the Robertsons' reconstruction plans – or whether the Robertsons timely submitted corrected plans to satisfy the City's building requirements – had no relevance to a cause of action for false imprisonment, as the trial court understandably ruled.

Next, the Robertsons point to testimony from respondent Encarnacion Cervantes, the City's chief building inspector, who opined during the first phase of the trial that Inbody's reconstruction plans were deficient. The Robertsons now claim the bifurcation prejudiced them because Cervantes's testimony reflected on the issue of Inbody's professional competence. This argument is unavailing. The same jury tried both phases of the case. The jury heard Cervantes's opinion of Inbody's work during the first phase. Moreover, Cervantes was called as a witness in both phases of the trial. Had the Robertsons designated Cervantes an as expert witness, they could have elicited his opinion on the adequacy of Inbody's plans a second time, during the malpractice phase. The Robertsons' failure to designate Cervantes as an expert witness does not render the trial court's decision to bifurcate an abuse of discretion.

DISPOSITION

The judgment is affirmed. Inbody's motion for sanctions on appeal is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

/s/ Boren
BOREN, P.J.

We concur:

/s/ Zebrowski,
ZEBROWSKI, J.

/s/ Brandlin
BRANDLIN, J.*

* Assigned by the Chairperson of the Judicial Council.

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 01/08/97

John L. Dodd
222 Fashion Lane
Suite 108
Tustin, CA. 92680

RE: Robertson, Dale
vs.
South Gate, City of
2 Civil B083784
Los Angeles NO. BC062077

THE COURT:

Petition for rehearing denied, by operation of Law. (rule 27=CRC)

APPENDIX C

Second Appellate District, Division Two, No. B083784
S058454

IN THE SUPREME COURT OF CALIFORNIA

DALE ROBERTSON Et Al., Appellants

v.

CITY OF SOUTH GATE Et Al., Respondents

(Filed Feb. 19, 1997)

Appellants' petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

RESOLUTION NO. S009

CITY OF SOUTH GATE

LOS ANGELES COUNTY, CALIFORNIA

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SOUTH GATE DECLARING THE CONDITION OF THE PROPERTY LOCATED AT 5870 IMPERIAL HIGHWAY TO BE A PUBLIC NUISANCE AND ORDERING THE ABATEMENT THEREOF

THE CITY COUNCIL OF THE CITY OF SOUTH GATE DOES HEREBY FIND, DECLARE, ORDER AND RESOLVE AS FOLLOWS:

Section 1: Pursuant to Chapter 11.48 of the South Gate Municipal Code, the City of South Gate notified Mr. Dale Robertson, owner of the property located at 5870 Imperial Highway (commonly known as Imperial Tire) that the condition of the property and the structure located thereon was determined to be a public nuisance which had to be abated. The notice further advised Mr. Robertson that the City would hold a public hearing on August 12, 1991 in the City Council Chambers of City Hall to hear any protests that he or other persons might have to abatement of the nuisance.

Section 2: On August 12, 1991, the City Council held a duly noticed public hearing to allow the property owners and any other interested parties to testify and submit evidence regarding the condition of Imperial Tire.

Section 3: Based upon the staff report, and the evidence presented at the time of the hearing, the City Council hereby makes the following findings of fact:

a. The property located at 5870 Imperial Highway is located at the intersection of Imperial Highway and Amery Way. The rear of the property fronts against a number of single-family residences. The property was improved with a commercial structure that sustained severe fire damage in September 1990. One wall of the structure was destroyed, and two other walls were partially damaged.

b. City staff sent numerous letters to Mr. Roberts [sic] requiring that the structure on the property be repaired, restored or demolished. Staff scheduled meetings with Mr. Robertson to discuss the rebuilding of the property. No plans for the rebuilding of the property were submitted. Further, Mr. Robertson refused staff's requests to inspect the property.

c. Based upon that refusal, staff obtained an inspection warrant to allow entry onto the property. The inspection demonstrated that the structure's roof had been totally demolished, leaving the sixteen foot high masonry wall of the structure without sufficient lateral support. The wall bracings were inadequate to provide support for the walls; further, the masonry blocks on the walls had separated, leaving the wall subject to further deterioration. Additionally, the property was strewn with debris, including used vehicle tires, household furniture and flammable liquids. Thus, it is a prime candidate for a second fire.

d. The structural engineer who accompanied city staff on the inspection recommended that the remaining walls be demolished or braced immediately. He opined that a moderate earthquake or strong wind could force the walls to collapse. This could cause heavy property damage or loss of life due to the proximity of the adjacent residential buildings and public rights-of-way. Further, the engineer recommended that if the walls were to be restored, the owner would have to submit complete plans and structural calculations to show all building components. Such plans would have to be certified, wet signed and stamped by a structural or civil engineer registered by the State of California. Further, the owner would have to test the block walls and reinforcements for fire damage, because the reinforcing bars, once exposed to heat, could fall. The test would have to include a test for seismic damage.

e. The Fire Department found that the building was structurally unsound and constituted a fire hazard because of the combustible debris located on the property. The Fire Department further found that the property was wired by temporary extension cords rather than permanent wiring.

f. The Health Department found that the toilet facilities on the premises were damaged and in need of repair to protect against waste water leakage.

Section 4: Based upon the findings set forth above in Section 3, the City Council finds and determines that the condition of the property and the structure located at 5870 Imperial Highway constitutes a public nuisance in that the current condition of the property is a fire hazard,

is not fit for use as a business, and, further, that the condition of the only remaining walls on the property creates a hazard to the neighboring residences and to passing pedestrians. Thus, the condition of the property is injurious to the public health, safety and welfare.

Section 5: The City Council orders that debris, tires, rims, combustible material and flammable liquids located on the property, as well as the toilet facilities, be removed within 7 days. Further, the City Council orders that if the property owner wishes to retain the walls and restore the structure in compliance with all current building and safety standards, the owner must submit complete plans and structural calculations to show all the remaining building components. Such plans would have to be certified, wet signed and stamped by a structural or civil engineer registered by the State of California. Further, the property owner must submit, in conjunction therewith, plans for the restoration of the building in its entirety. In addition, he must submit to the City the results of tests on the block walls and their reinforcements to prove their current safety. All the preceding actions must occur within 15 days of the date of this resolution. Thereafter, the owner must obtain building permits to reinforce the walls and begin restoration of the structure within an additional 5 days. Finally, once the building permits have been issued, the owner must, with due diligence, and making every effort to expeditiously complete construction, restore the building within 60 days. Given the owner's past failure to take any affirmative steps to remedy the condition of the property, the City Council further determines that if any of the actions required to be taken by this resolution are not completed with the time

periods set forth herein, the owner shall be required to demolish the structure within 10 days of the date of the owner's default on any of the time limits set forth herein.

Section 6: If the nuisance is not abated as specified herein, then the Director of Building and Safety is directed to cause the nuisance to be abated by the City by clearing the property and demolishing the walls. The Director is also directed to notify the property owner in writing by certified mail and regular mail of the cost of removal of the nuisance and that payment in full for removal of the nuisance is due to the City within 10 days of the date of mailing of the notice. If the total cost of abating the nuisance is not paid to the City within 10 days after the date of notice, the City Clerk shall record, in the Office of the County Recorder, a statement of the total balance due to the City which shall constitute a lien upon the subject property.

Section 7: The City Clerk is hereby directed to send a copy of this resolution by certified and regular mail to the owner or owners of the property located at 5870 Imperial Highway.

Section 8: This resolution shall take effect immediately.

PASSED, APPROVED AND ADOPTED this 26th day of August, 1991.

/s/ John Famiz
Vice Mayor

ATTEST:

/s/ Janet Stubbs
City Clerk

APPROVED AS TO FORM:

/s/ William B. Rudds
City Attorney

APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/20/93

HONORABLE David Yaffe JUDGE

HONORABLE JUDGE PRO TEM
6.

A.Ayala, CSL Deputy Sheriff

DEPT. 68

T.Acuna DEPUTY CLERK

ELECTRONIC RECORDING MONITOR

D CASE Reporter

8:30 am BC062077

DALE ROBERTSON, ET AL	Plaintiff Counsel CHRISTOPHER SUTTON (X)
VS	
CITY OF SOUTH GATE, ET AL	Defendant Counsel GREGORY KUNERT (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT, CITY OF SOUTH GATE, CITY COUNCIL OF THE CITY SOUTH GATE, DONALD F. LEUR, WILLIAM CORNETT, ENCARNACION S. CERVANTES, STEVEN H. ROSENBLIT AND TODD ARGOW TO STRIKE PORTIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT

Motion is granted.

In 1979, the California Supreme Court held in AGINS v. CITY OF TIBURON, 24 C3d 266, 273, that a landowner deprived of his property by the excessive use of police power may not sue in inverse condemnation without challenging the administrative action by mandamus. That rule has since been applied uniformly by the appellate courts. PATRICK MEDIA GROUP V. CALIFORNIA COASTAL COMMISSION, 9 CA4th 592 (1992); ROSSCO HOLDINGS v. STATE, 212 CA 3d 642 (1989); CALIFORNIA COASTAL COMMN v. SUPERIOR COURT (Ham) 210 CA3d 1488 (1989). Plaintiff's reliance upon pre-Agins authority for a contrary rules in [sic] not persuasive.

Ten days leave to amend.

Moving party to give notice and file proof of service in this department within five days.

MINUTES ENTERED
01/20/93
COUNTY CLERK

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: March 31, 1993 T. Acuna, *Deputy Clerk*

Honorable David P. Yaffe, *Judge*

7. A. Ayala, *C.S.L.* D Case, *C.S.R.*

(Parties and Counsel checked if present)

BC062077 Counsel For Plaintiff:

DALE ROBERTSON, ET AL

vs.

CITY OF SOUTH GATE, ET AL.

Counsel For Defendant:
GREGORY KUNERT (X)
ADAM F. STREISAND (X)
CHARLES D. BOAGS (X)

NATURE OF PROCEEDINGS:

page 1 of 2

1. DEMURRER BY DEFENDANT C.L. TAYLOR WRECKING COMPANY TO THE COMPLAINT.

2. MOTION BY DEFENDANT CITY OF SOUTH GATE, CITY COUNCIL OF THE CITY OF SOUTH GATE, DONALD LEUR, WILLIAM CORNETT, ENCARNACION CERVANTES, STEVEN ROSENBLIT AND TODD ARGOW TO STRIKE ALLEGATIONS OF PLAINTIFF'S SECOND AMENDED COMPLAINT.

3. MOTION TO STRIKE AT ISSUE MEMORANDUM

4. NUNC PRO TUNC ORDER

1. Demurrer is sustained with ten days leave to amend. There is no allegation that Taylor acted outside the scope of its authority, or, if it did, what acts were outside the scope of its authority.

Counsel for Taylor to give notice and file proof of service within five days.

2. Motion to strike is granted without leave to amend. All allegations that are the subject of the motion support a cause of action for inverse condemnation and are improper for reasons set forth in the order of 1/20/93. In addition, the second amended complaint is egregiously prolix and evidentiary, making the analysis of the motion unduly burdensome; said complaint consisting of 184 numbered paragraphs and 47 pages, does not state the facts in concise language as required by C.C.P. § 425.10 and is therefore not drawn in conformity with the laws of this state within the meaning of C.C.P. § 436(b). Request for sanctions is denied.

3. Motion to strike the At-Issue Memorandum is granted. The At Issue Memorandum represents to the court that the case is at issue; the representation is false.

Counsel for the city to give notice on #2 and #3 and file proof of service in this department within five days.

4. NUNC PRO TUNC ORDER

It appearing to the court that the minute order of 1/20/93, for Department 68 in the above-entitled action does not properly reflect the court's order, said minute order is ordered corrected as of 1/20/93 as follows:

by striking: Plaintiff's reliance upon pre-Agins authority for a contrary rules in not persuasive.

by adding: Plaintiff's reliance upon pre-Agins authority for a contrary rule is not persuasive.

APPENDIX G

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/06/94

HONORABLE DAVID YAFFE JUDGE

HONORABLE JUDGE PRO TEM
10.

A. AYALA, CSL Deputy Sheriff

DEPT. 68

T. Acuna DEPUTY CLERK
S. GWYNNE, CT ASST

ELECTRONIC RECORDING MONITOR

D. CASE Reporter

8:30 am BC062077

DALE ROBERTSON, (X) ET AL	Plaintiff Counsel IN PRO PER CHRISTINE ROBERTSON (X)
VS	
CITY OF SOUTH GATE, ET AL	Defendant Counsel GARY E. GANS (X) ADAM F. STREISAND (X) ROBERT G. KUSHNER (X)

NATURE OF PROCEEDINGS:

1. MOTION BY DEFENDANT, CITY OF SOUTHGATE, FOR SUMMARY ADJUDICATION, FILED 11/15/93.

2. MOTION BY DEFENDANT, CITY OF SOUTHGATE FOR SUMMARY ADJUDICATION, FILED 11/24/93.

3. MOTION BY DEFENDANT, MILTON INBODY, FOR SUMMARY JUDGMENT

4. MOTION BY DEFENDANT, CITY OF SOUTHGATE, FOR ORDER STAYING DEPOSITION OF C. L. TAYLOR WRECKING COMPANY AND QUASHING THE DEPOSITION NOTICE

1. Defendant, City of Southgate, Motion for Summary Adjudication of Issues filed 11/15/93 is granted.

Plaintiffs cannot maintain an action for inverse condemnation for the reasons stated in the Minute order of January 20, 1993, and the so-called causes of action for declaratory relief are nothing more than a restatement of the inverse condemnation claims under a different name. Plaintiff's reliance upon LEPPO v. CITY OF PETALUMA, 20 CA3d 711 (1971) is misplaced because the holding in that case is inconsistent with the later decision of the Supreme Court in AGINS v. CITY OF TIBURON, 24 C3d 266 (1979). The other authority relied upon by plaintiffs, ROSE v. CITY OF COALINGA, 190 CA3d 1627 (1987), is not in point because in that case there was no administrative action or "regulatory taking." The property owner in that case AGREED to the demolition of his building, and the issue in the case was whether his agreement was procured by fraud or duress. The facts alleged in the 15th Cause of Action do not constitute federal civil right violations. DUFFY v, CITY OF LONG BEACH, 201 CA3d 1357, 1360 (1988).

2. Defendant, City of Southgate's Motion for Summary Adjudication of Issues filed 11/24/93, is granted as to Issues # 1, 2, 3 and 4.

Plaintiff have only one cause of action for the damage done to their property, no matter how many names they give to it. Plaintiffs cannot recover from the City defendants for such damage under ANY THEORY because they did not comply with procedural requirements that afforded the City the opportunity to rescind or modify its action rather than become liable for payment of compensation. PATRICK MEDIA GROUP v. CALIFORNIA COSTAL [sic] COMMISSION, 9 CA4th 592, 615 (1992).

Motion for Summary Adjudication is denied as to Issue #5, as to all moving parties except LEUR and CORNETT.

Paragraphs 29 and 30 of the Dale Robertson declaration raises a triable issue as to whether he was arrested while the Abatement Order was in effect and whether his arrest was lawful or reasonably believed to be lawful at the time it was made. Motion is granted as to LEUR and CORNETT; Robertson declaration admits they were not involved in the arrest.

Motion is granted as to Issues 6 and 7.

The declarations of plaintiffs admit that Christine Robertson was not arrested or imprisoned and that Kevin Robertson was not arrested or imprisoned and has no interest in the property.

3. Defendant Inbody's Motion for Summary Judgment is denied.

It cannot be ascertained from the moving papers whether, or to what extent, the corrections required by the City to Inbody's plans were the result of errors or omissions in the plans as originally submitted. There is therefore a

triable issue as to whether Inbody exercised due care in the preparation or correction of said plans.

4. Defendant City of Southgate's Motion to Stay deposition is denied.

Moving party properly objected to the taking of the deposition on the ground that it did not get the additional five days' notice to which it is entitled when notice is given by mail, but moving party states no reason why it is not sufficiently protected by the provision in Code of Civil Procedure 2025(g) that would prevent the deposition from being used against the moving party it if does not attend. The contention by moving party that plaintiffs had no right to designate City Hall as the place where the deposition is to be taken is without merit. Moving party cites no authority for any such rule, and there does not seem to be any good reason why plaintiffs should not be permitted to take the deposition there absent a showing that appropriate space is not available there. The taking of a deposition on city property in a matter in which the city is a party does not constitute the appropriation of public property for private use.

Plaintiffs may renotice the deposition, and if they do so properly they may take it prior to trial despite the discovery cutoff.

Counsel for defendant City of Southgate to give notice.

APPENDIX H

Code of Civil Procedure § 437c. Grounds for and effect of summary judgment; procedure on motion

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at *any* earlier time after the general appearance *that* the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 28-day period of notice shall be increased by two court days. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or

may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.

The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made at the hearing shall be deemed waived.

* * *

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived.

(e) If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion

of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f) * * * (1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs * * * A motion for summary adjudication * * * shall be granted only if it completely disposes of a cause * * * of action, an affirmative defense, a claim for damages, or an issue of duty. * * *

(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. However, a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

* * *

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in

addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

* * *

(m)(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied.

(3) When an objection is made to a motion for summary adjudication, neither a party, nor a witness, nor the court may comment upon the grant or denial of a motion for summary adjudication, or upon the fact that a party did not seek to summarily adjudicate any issue.

(n) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(*o*) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a

triable issue of material fact exists as to that cause of action or a defense thereto.

* * *

Supreme Court, U.S.
FILED
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CLERK

No. 96-1831

In The

Supreme Court of the United States

October Term, 1996

DALE ROBERTSON AND CHRISTINE ROBERTSON,

Petitioners,

vs.

THE CITY OF SOUTH GATE, CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, where the federal question does not meet this Court's test for ripeness? Is a Petition for Writ of Certiorari predicated on the takings clause of the Fifth Amendment ripe for review when the state courts have held that the petitioners failed to avail themselves of their opportunities to utilize the procedures prescribed by the state courts for obtaining compensation?

2. Should a Petition for Writ of Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, where petitioners are precluded from maintaining a claim for compensation under the Fifth Amendment's takings clause by governing principles of *res judicata*?

3. Should a Petition for Writ of Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, to determine whether action enforcing a nuisance abatement resolution constituted a regulatory or physical taking, where under the circumstances the issue is purely a matter of state law, where such review would require examination and weighing of the evidence before the lower courts, and where petitioners voluntarily acquiesced in the lower court's granting of summary judgment on such claims?

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OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Second Appellate District, is set out verbatim in Appendix A to the Petition. By its terms, the Court of Appeal Opinion is not certified for publication in the Official Reports. Under Rules 976 and 977 of the California Rules of Court (set forth verbatim in Appendix I hereto), it may not be cited or relied upon by any court or any litigant in any other case, and thus has zero precedential importance.

JURISDICTION

There is no jurisdiction over the federal constitutional issues presented, because those issues are not ripe for adjudication under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402-1403 (9th Cir. 1989), *cert. den.*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). The California Courts below held that petitioners failed to pursue the available avenues of redress called for under California law for their "takings" claims. Petitioners having failed to avail themselves of their state compensation remedies, their federal constitutional claims are not ripe for adjudication and there is, accordingly, no jurisdiction to entertain the present petition.

STATUTES AND OTHER PROVISIONS INVOLVED

California Rules of Court, Rules 976 and 977, Appendix I hereto.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioners were the proprietors of a tire dealership in the City of South Gate. Pet.App.A, D; AA 1/192.[1] In September of 1990, a fire substantially damaged the business and the structure in which the business was housed, including the roof, garage doors, equipment and concrete block walls. Pet.App.A, D; AA 1/194.

Eleven months later, on August 26, 1991, the City Council of the City of South Gate duly passed, approved and adopted Resolution Number 5009, "DECLARING THE CONDITION OF THE PROPERTY LOCATED AT 5870 IMPERIAL HIGHWAY TO BE A PUBLIC NUISANCE AND ORDERING THE ABATEMENT THEREOF." Pet.App.D; AA 1/97-102.[2] As recited in Resolution 5009, it was adopted following a required public hearing and submission of testimony and evidence by petitioners and others. Pet.App.D; AA 1/97. The City Council rendered factual findings on the evidence presented (*Id.*), and rendered a decision embodied in the resolution. *Id.*

Neither petitioners nor any other person ever challenged Resolution 5009, or its findings, its conclusions, or the proceedings which led to its adoption, by a Petition for Writ of Administrative Mandamus pursuant to California Code of Civil Procedure Section 1094.5. As a result,

---

[1] The abbreviation "AA" refers to Appellants' Appendix which, together with the Reporter's Transcript ("RT") constituted the record on appeal before the California Court of Appeal.

[2] Resolution 5009 is set out verbatim as Appendix D to the Petition herein, although it is erroneously titled "RESOLUTION NO. S009". Items included in the Appendix to the Petition are abbreviated herein as "Pet.App."

under governing principles of California law[3], the following facts were found by the City Council to exist *eleven months* after the fire, and were conclusively established in the courts below:

1. Petitioners' property at 5870 Imperial Highway in the City of South Gate is located at the intersection of Imperial Highway and Amery Way. The rear of petitioners' property fronts against a number of single-family residences. The property was improved with a commercial structure that sustained severe fire damage in September of 1990. One wall of the structure was destroyed, and two other walls were partially damaged. Pet.App.D; AA 1/98, ¶a.

2. Following the fire, City staff sent numerous letters to Mr. Robertson requiring that the structure on the property be repaired, restored or demolished. Staff scheduled meetings with Mr. Robertson to discuss the rebuilding of the property. No plans for the rebuilding of the property were submitted. Furthermore, Mr. Robertson refused staff's requests to inspect the property. Pet.App.D; AA 1/98, ¶b.

3. Staff obtained an inspection warrant to allow entry onto the property. The inspection demonstrated that the structure's roof had been totally demolished, leaving the sixteen foot high masonry walls of the structure without sufficient lateral support. The wall bracings were inadequate to provide support for the walls; further, the masonry blocks on the walls had separated, leaving the wall subject to further deterioration. Additionally, the property was strewn with debris, including used vehicle tires, household furniture and flammable liquids. Thus, it was a prime candidate for a second fire. Pet.App.D; AA 1/98, ¶c.

---

[3] See, "REASONS FOR DENYING THE WRIT", Part II, *infra*.

4. The structural engineer who accompanied city staff on the inspection recommended that the remaining walls be demolished or braced immediately. He opined that a moderate earthquake or strong wind could force the walls to collapse. This could cause heavy property damage or loss of life due to the proximity of the adjacent residential buildings and public rights-of-way. Further, the engineer recommended that if the walls were to be restored, the owner would have to submit complete plans and structural calculations to show all building components. Such plans would have to be certified, wet signed and stamped by a structural or civil engineer registered by the State of California. Further, the owner would have to test the block walls and reinforcements for fire damage, because the reinforcing bars, once exposed to heat, could fail. The test would have to include a test for seismic damage. Pet.App.D; AA 1/98-99, ¶d.

5. The Fire Department found that the building was structurally unsound and constituted a fire hazard because of the combustible debris located on the property. The Fire Department further found that the property was wired by temporary extension cords rather than permanent wiring. Pet.App.D; AA 1/99, ¶e.

6. The Health Department found that the toilet facilities on the premises were damaged and in need of repair to protect against waste water leakage. Pet.App.D; AA 1/99, ¶f.

Thus, for more than eleven months following the fire, petitioners allowed substantial hazards to public safety to exist on their property.

Resolution 5009 also directed either that petitioners abate the nuisance conditions by taking certain specified actions within specific time periods, or that, if petitioners failed to do so, City staff abate the nuisance by clearing the property and demolishing the structural ruins. Pet.App.D; AA 1/100-101. *The option was entirely petitioners'*. Resolution 5009 allowed petitioners to rebuild,

provided all tires, rims and debris were cleared from the property, proper plans were submitted, hazards abated, and construction commenced within the specifications and time limits of the Resolution. *Id.*

Petitioners never challenged Resolution 5009 or its findings by a Petition for Writ of Mandamus. Petitioners never challenged the remedial measures called for in Resolution 5009, or the time limits for completing those measures, by a Petition for Writ of Mandamus.

Instead, petitioners made half-hearted efforts to do less than the Resolution required, while ignoring any obligation to comply with those provisions with which they disagreed. When petitioners failed to comply in a timely fashion, and their failure continued for over two months, the City took the only course reasonably available: it applied to the Court for a warrant to abate the nuisance conditions itself. Pet.App. 5-6; AA 3/779-780. Even then, the City Prosecutor and the Court offered petitioners *more* time with which to comply with the simplest of the City's requirements: removal and storage of personal property, old tires and debris prefatory to petitioners' rebuilding. *Id.*; AA 3/784-793. Instead of accepting the Court's offer of additional time to effectuate the remediation, instead of requesting even more time than the extensions being offered were that necessary, and disregarding even their own lawyer's advice, petitioners elected their own fate:

> "THE COURT: Okay. Mr. Robertson, just listen carefully.
>
> * * *
>
> "THE COURT: I can get into that. But, Mr. Robertson, did you hear and understand and is that time frame and the conditions, are they agreeable with you, sir?
>
> "MR. ROBERTSON: Well, I hear it. I understand it. But whether I can comply with it or not is something –

"THE COURT: Well, we are going to give you a relief valve if you have bad weather or some misfortune that can't be avoided. But aside from that, will you make a good-faith effort to abide by the terms and conditions?

"MR. ROBERTSON: Well, I hear them. I understand them. But, as Gene [Beckman, the Robertsons' attorney] knows, I have a boss that tells me, that small voice, I guess you could say, and that's all I go by.

"THE COURT: Well, I mean, if you are telling me that you don't want to abide by these terms and conditions – What you are saying is that you are not going to abide by these terms and conditions. Then I am going to issue the order now.

"MR. ROBERTSON: Well, things come to me slowly. I have to – I rely on daily prayer and that's where I am right now.

* * *

"THE COURT: . . . So in that regard, with that correction, Mr. Robertson, do you understand the essence of what we are speaking?

"MR. ROBERTSON: I think I do. If you look, I don't think you will find a tire business in the City of South Gate that doesn't have outside storage.

"THE COURT: Well, I am not concerned with that type of discussion. At this point, Mr. Robertson, the question is: Do you feel you can live with the agreement that you are making in here? Because the alternative, sir, is if you tell me you feel you cannot or you have some other source giving you information or advice, I will sign the order tomorrow morning.

"MR. ROBERTSON: The order to bulldoze me down, sir?

"THE COURT: That's right, sir. The people have – the City of South Gate have sufficiently shown a concern for fire and safety and, I guess, the time has come to fish or cut bait.

"MR. ROBERTSON: Yeah.

"THE COURT: I am still willing to work with you. In fact, this is at my insistence that these time frames be put in here instead of just issuing the order today.

* * *

"THE COURT: Well, sir, it is not up to me to go over your plans. My concern is that the City of South Gate has followed the law, has a resolution – a hearing and a resolution was issued, in effect, requiring that the property be bulldozed. And it was my discussion with counsel to give you an opportunity to do things in a little timely fashion, give you some opportunity to do things in a more business-like way to protect your business, too, to see that you come back in, you know, and flourish.

"Now you want to put the Court in a hard spot. The Court does, you know, makes orders all day long. I put people in jail, but that is not – I don't get any pleasure out of it, but that is my job. My job right now is to follow the law.

"MR. ROBERTSON: Well –

"THE COURT: You have that obligation, too, sir.

"MR. ROBERTSON: Can you – I cannot say that I have done anything outside of the law. I proved to the city council that I was not 50-percent burnt, but that did not matter to them at all. At that time, if I am not 50-percent gone, I was supposed to have been able to rebuild.

> "THE COURT: Well, I am not going to rehear the City's matter. They made that determination, sir. If it is not me, it is somebody else that is going to make this order.
>
> "MR. BECKMAN [Petitioners' then attorney]: Your Honor, may I? [addressing his client, appellant Dale Robertson] The removal of the tires and the other personal property is for the purposes of reconstructing the building and to clean up the property at that time. I don't think the issue of outside storage is a proper one for this nor is it definitive for your purposes after the building is reconstructed. That is a different battle which you might have to fight with the City of South Gate, but it is to clear off the premises for construction purposes.
>
> "MR. ROBERTSON: Do what you will, but it will take the bulldozer to move the tires."

AA 3/787-792 (Transcript of Municipal Court Hearing on Abatement Warrant, Appendix J, App. 7-12).

The Municipal Court issued the abatement warrant directing the City to abate the nuisance, and the City proceeded to do so. Pet.App. 5-6. On November 14, 1991, when the City's contractor arrived at the site to continue the abatement, their access to the subject property was barred by appellant Dale Robertson. *Id.*; RT 4/751-752. Mr. Robertson refused to move out of the way of the contractor's bulldozer, despite repeated requests that he do so. *Id.* Mr. Robertson had been told that he had no right to be on the property by virtue of the City's Order to Vacate, posted when the City determined the property to be a nuisance. *Id.*; Pet.App.5, 6, 21. Mr. Robertson was aware of the Order to Vacate, because he had been cited several times for violating it. *Id.* The City had permitted Mr. Robertson to enter the property for the purpose of abating the nuisance, but Mr. Robertson testified that abating the nuisance was not his purpose on November

14, 1996. When Mr. Robertson continued to refuse to leave, he was arrested. *Id.*; RT 4/864-865.

The next day, the Penal Code § 148 charges against Mr. Robertson were dismissed under Penal Code § 991, because the Municipal Court Abatement Warrant had expired the day before Mr. Robertson was arrested. AA 3/796-808. No one alerted the Court at that time of the Order to Vacate and Mr. Robertson's violation of that order. *Id.*

II. PROCEDURAL HISTORY

Petitioners brought this action against defendants City of South Gate ("City"), its City Council, and certain City employees (collectively, the "City") for alleged damages resulting from the City's determination that petitioners' fire-gutted property constituted a nuisance which warranted abatement. On January 20, 1993, the trial court granted the City's motion to strike allegations of petitioners' First Amended Complaint ("first motion to strike"). Pet.App. E, 33-34; AA 1/182-185. The allegations stricken were those which challenged Resolution 5009, its findings, its orders or the process from which that resolution resulted. *Id.*; AA 1/77-79. The trial court ruled that petitioners' failure to challenge the City's quasi-adjudicative determination under C.C.P. Section 1094.5 rendered the decision, and the process by which the City reached its nuisance determination, *res judicata* and immune from collateral attack. *Id.*; AA 1/182-185.

In granting the City's first motion to strike, the trial court granted petitioners leave to amend. *Id.* Instead of amending the complaint to attempt to plead a mandamus cause of action, however, petitioners served the City with a Second Amended Complaint that merely re-alleged stricken allegations verbatim. Pet.App. F; AA 1/187-233. In other instances, petitioners added some verbiage to make old allegations look new or simply redrafted other

stricken allegations. *Id.* The City therefore filed a second motion to strike ("second motion to strike"). *Id.*; AA 1/247-280. When petitioners did not attend the hearing, the motion was granted. *Id.*; AA 2/338.

Thereafter, the City filed a motion for summary adjudication of petitioners' inverse condemnation causes of action and petitioners' declaratory relief causes of action which were cumulative of the inverse condemnation claims ("first summary adjudication motion"). AA 2/435, *et seq.* The City filed a second motion for summary adjudication as to petitioners' remaining claims against the City defendants: trespass, conversion and false imprisonment ("second summary adjudication motion"). AA 3/710, *et seq.* The trial court heard both motions on January 6, 1994. The trial court granted the first summary adjudication motion, on the ground that petitioners' failure to challenge the City's action declaring a nuisance and ordering abatement in mandamus rendered the City's actions *res judicata* and immune from liability for damages in inverse condemnation. Pet.App.G; AA 4/1052-1053 (motion granted for reasons stated in 1/20/93 minute order); Pet.App.E (1/20/93 minute order). The trial court had provided a "tentative" ruling on the second summary adjudication motion indicating its inclination to grant it as to the trespass and conversion causes of action, but deny it as to the false arrest claim. After petitioners expressly declared that they had no objections to the trial court's tentative ruling on the second summary adjudication motion (RT 1/57-58), the court granted the second summary adjudication motion as to the trespass and conversion causes of action, but denied it as to the false imprisonment cause of action asserted by appellant Dale Robertson. Pet.App.G; Pet.App.A, 18; AA 4/1053-1054. Following those motions, the only claims remaining to be tried as against the City were appellant Dale Robertson's claims of false arrest.

Appellant Dale Robertson's false arrest claims were tried to a jury, which returned a verdict for the City.

Petitioners appealed the judgment against them to the California Court of Appeal, Second Appellate District. Following briefing and argument, the Court of Appeal issued an unpublished opinion[4] affirming the judgment in full (Pet App. A). The California Supreme Court denied petitioners' Petition for Review. Pet.App.C.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FEDERAL QUESTION RIPE FOR REVIEW: PETITIONERS FAILED TO EXHAUST AVAILABLE STATE COURT COMPENSATION MECHANISMS

Petitioners' Fifth Amendment claim for just compensation is not ripe for review, because petitioners failed to seek compensation through the procedures the State of California provided for doing so. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Honorable Court held:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. [footnote omitted] The Fifth Amendment does not proscribe the taking of

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[4] Pursuant to California Rules of Court, Rule 976, decisions of the California Courts of Appeal are not published in the Official Reports unless a majority of the court rendering the opinion find that the opinions meets certain specified criteria. In this case, the Opinion below shows that it was not published in the Official Reports. Pursuant to Rule 977 of the California Rules of Court, an unpublished opinion may not be cited as precedent or relied on by any court or by any party in any other action. Rules 976 and 977 are reproduced as Appendix I.

> property; it proscribes taking without just compensation. [citation omitted] Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.' "

473 U.S. at 194.

This aspect of the ripeness doctrine applies regardless of whether the alleged taking is characterized as "regulatory" or "physical," for the policy is the same: until the property owner utilizes the procedures prescribed by the State and been denied compensation, no Fifth Amendment violation has occurred. *See, Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402-1403 (9th Cir. 1989), *cert. den.*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). In *Sinaloa*, the Ninth Circuit held that California's inverse condemnation remedies satisfy the *Williamson* standard and that failure to utilize California's remedies is a bar to federal court relief under the Fifth Amendment. *Id.*

As the Opinion of the California Court of Appeal in this case reveals, petitioners failed to utilize the available California procedures for seeking compensation, because they did not pursue a petition for writ of mandamus. The Courts below followed a long line of California cases which made it plain that such a mandamus petition was part and parcel of an inverse condemnation claim in California. The requirement that they pursue mandamus was made known to petitioners from the outset of this case, when the City filed its Motion to Strike allegations of the complaint. In granting the City's motion, the trial court expressly held that petitioners were required to pursue administrative mandamus as part of their quest for compensation, and granted petitioners leave to amend their pleading. For reasons unknown, petitioners failed to

take that opportunity to plead for mandamus relief in their amended complaint.

Petitioners argued before the California courts that the established procedure calling for a petition for writ of mandamus only applies in cases of alleged "regulatory takings" and that petitioners were alleging a "physical" taking.[5] The correctness of petitioners' view that California law requires a mandamus proceeding only in "regulatory" takings cases is not an appropriate issue for this honorable Court. The California courts are in the best position to judge what California procedures were available to petitioners and/or were required to be pursued. The several California courts that visited the question in this case determined that petitioners had not availed themselves of the procedures which California provided for doing so. Accordingly, this Honorable Court should decline certiorari on the simple ground that petitioners have failed to present a federal claim that is ripe for review.

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[5] In fact, as shown in Part III, *infra*, the City's actions in conducting a public hearing, finding that a nuisance exists, directing abatement of the nuisance and ordaining that the City would abate the nuisance if petitioners failed to do so in a timely fashion are best characterized as regulatory acts. Otherwise, virtually every instance of municipal regulation could be converted to a "physical" taking merely by a land owner's refusal to comply with the regulation and forcing the government to compel compliance by physical means.

II. THE CALIFORNIA COURTS PROPERLY HELD THAT PETITIONERS WERE BARRED BY THE DOCTRINE OF RES JUDICATA (PRECLUSION) FROM ASSERTING THEIR CLAIMS FOR COMPENSATION BECAUSE PETITIONERS FAILED TO CHALLENGE THE CITY'S DECISIONS BY A PETITION FOR WRIT OF MANDAMUS

The California courts applied a long line of California cases which require that to pursue an inverse condemnation action predicated on adoption or enforcement of a quasi-adjudicative decision (such as that embodied in Resolution 5009) land owners must challenge the decision by a writ of administrative mandamus. *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994); *California Coastal Comm. v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 1496 (1989); *Rossco Holdings Inc. v. State*, 212 Cal.App.3d 642, 661 (1989); *Patrick Media Group, Inc. v. California Coastal Comm. (PMG)*, 9 Cal.App.4th 592, 606 (1992); *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 (1992). Those cases, and cases preceeding them, all hold that a failure to challenge a quasi-adjudicative decision by a petition for writ of mandamus bars a claim for damages or compensation for inverse condemnation or violation of civil rights arising out of the decision. The courts below applied that rule in determining that petitioners were barred from pursuing their claims herein.

The South Gate City Council conducted a public hearing and determined that the burned-out structure and debris on petitioners' property was a hazard to public health and safety and a nuisance. The City Council therefore adopted Resolution 5009 in August of 1992, determining that a nuisance exists and setting forth a schedule for abating the nuisance. Petitioners' damages claims are thus barred by the preclusive collateral estoppel aspect of *res judicata*. *Rossco, Ham, Swartzendruber* and *PMG, supra*; *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986).

Ham, *Rossco*, and *PMG* involved collateral actions for damages based upon quasi-adjudicative administrative decisions. *Ham*, 210 Cal.App.3d at 1496; *Rossco*, 212 Cal.App.3d at 660-61; *PMG*, 9 Cal.App.4th at 607. In *Ham*, the Coastal Commission approved the demolition and rebuilding of a beach-front residence on the condition that the owner dedicate an easement for public access. 210 Cal.App.3d at 1492. In *Rossco*, property owners alleged that the Coastal Commission imposed unreasonable conditions on development of the land. 212 Cal.App.3d at 648. In *PMG*, the Coastal Commission conditioned a hotel construction permit on the removal of billboards from the property. 9 Cal.App.4th at 599. In each case, the failure to obtain judicial review of the agency's discretionary action by administrative mandate rendered it *res judicata* and immune from collateral attack. *Ham*, 210 Cal.App.3d at 1493; *Rossco*, 212 Cal.App.3d at 657; *PMG*, 9 Cal.App.4th at 608.

Moreover, the rule expressly extends to bar petitioners' claims to compensation under the Fifth Amendment. In *University of Tennessee v. Elliott, supra*, 478 U.S. 788, 92 L.Ed. 635, this honorable Court held that state law principles of *res judicata* are applicable in federal constitutional cases where state law so provides. Quoting from a previous decision of the Court, the Court in *Elliott* observed:

> "When an administrative agency is acting in a quasi judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 478 U.S. at 797-98, 92 L.Ed.2d at 645-46.

It is undisputed that the South Gate City Council was acting in a quasi-judicial capacity when it adopted Resolution 5009 finding petitioners' property to be a nuisance.

Under such circumstances, this honorable Court concluded in *Elliott*:

> "Accordingly, we hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' . . . *federal courts must give the agency's factfinding* the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799, 92 L.Ed.2d at 646-47 (citation, footnote omitted; emphasis added).

The holdings of the state courts below that petitioners' claims were barred under California principles of *res judicata* is in accord with – indeed directed by – the *Elliott* decision.

Both federal and California courts have relied on *Elliott* to bar federal claims similar to petitioners' on *res judicata* grounds. Following *Elliott*, the Ninth Circuit has held that the California rule expressed in the *Ham* and *Rossco* decisions and their progeny serves to bar federal civil rights claims in federal courts. *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. Cal. 1994), *cert. den.*, ___ U.S. ___, 115 S.Ct. 2613, 132 L.Ed.2d 856 (1995). In *Miller*, the District Court granted summary judgment for the defendant on plaintiff's Section 1983 action on the ground that the plaintiff's failure to challenge a Civil Service Commission decision by a petition for administrative mandamus pursuant to California Code of Civil Procedure Section 1094.5 rendered the administrative decision final, binding, *res judicata* and immune from collateral attack. 39 F.3d at 1031-1032. The Ninth Circuit affirmed the summary judgment, holding that the plaintiff's civil rights case was barred under the doctrines of *res judicata* and collateral estoppel under California law. 39 F.3d at 1032.

Moreover, the Ninth Circuit in *Miller*, also stated that it had previously held that California had already incorporated the *Utah Construction* standard reaffirmed in *Elliott*, so the only remaining question was "whether the administrative hearing met the requirements of California law such that a California court would have accorded the determination preclusive effect." 39 F.3d at 1033.

The California Court of Appeal followed *Elliott*, *Miller*, *Swartzendruber*, and earlier California cases in a case directly involving a local governmental land use decision in *Briggs v. City of Rolling Hills Estates*, 40 Cal.App.4th 637 (1995). In short, the California courts properly invoked California preclusion rules and determined that petitioners' claims were barred. Indeed, the courts below were instructed to do so by the holding of this honorable Court in *Elliott*. This Court should not engage in a needless exercise in reviewing California's preclusion rules; the Ninth Circuit has already determined that the applicable California rules pass federal muster in *Miller*, in which this Court denied certiorari and which has never been questioned or contradicted by other authority.

A. The California Courts Were the Proper Forum For Determining the Limits of California's *Res Judicata* Rules; Petitioners' Present Claim That The Decision Below Was Wrong Because Petitioners Complain of City Actions After Adoption of Resolution 5009 Was Adequately Disposed of By the California Courts

In claiming that they are not challenging Resolution 5009 itself but the manner in which it was enforced and applied by the City, petitioners merely repeat an argument they made to the California courts. The California courts rejected the argument, holding that the California rule of preclusion bars their claims for damages predicated on the City's nuisance abatement activities.

The California courts are unquestionably in the best position to determine the extent of their own preclusion rules, and the decisions below were unquestionably correct. *See, Takahashi v. Board of Education*, 202 Cal.App.3d 1464, 1474, *et seq.* (1988). In *Takahashi*, the court explained that "California courts employ the 'primary rights' theory", in which " 'the significant factor is the harm suffered.' " *Id.* at 1474. Thus, a prior adjudication that an employee's termination was for cause barred her subsequent suits for common law wrongful discharge, violation of federal civil rights acts for discrimination in employment on the basis of race or gender, and intentional infliction of emotional distress, since the harm suffered, and hence the "primary right" alleged, was plaintiff's termination from employment. *Id.* at 1475-1476. Likewise, the harm allegedly suffered herein, and hence the "primary right" involved, was the demolition of petitioners' fire-decimated structure to abate the public nuisance. The only "harm" petitioners' have ever alleged to have suffered was that property loss. Regardless of the theory of recovery they allege, petitioners' claims involve the same primary right and are barred and precluded by the doctrine of *res judicata*. And, *Elliott* required that the lower courts follow California's rules of *res judicata*/preclusion with respect to petitioners' federal claims.

The court below correctly concluded that California law precluded petitioners' claims, even in the face of petitioners' argument that they were not challenging Resolution 5009 itself.[6] In the California Supreme Court case of *Hensler, supra*, Hensler argued, as do petitioners here, that he was not challenging the validity of the city's action. Instead, Hensler sought damages on the ground

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[6] An argument which the California Court of Appeal found to be factually not supported by the record. Pet. App. A, App. 13, n. 1.

that the ordinance effected a taking of his property. Hensler argued that as a matter of federal constitutional right, an action in inverse condemnation seeking damages for a permanent taking may be initiated without a challenge to the application of the ordinance to the affected property. *Hensler*, 8 Cal.4th at 9. Here, similarly, petitioners argue that an action to recover damages for abatement of a nuisance can be initiated without a challenge to the nuisance determination which authorized the abatement. The California Supreme Court soundly rejected Hensler's argument:

> "A California landowner who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. *If he does so, the state may deem the owner to have waived the 'taking' claim.*"

Hensler, supra, 8 Cal.4th at 19 (emphasis added).

The *Hensler* court concluded:

> "We therefore reject . . . [Hensler's] argument that he need not pursue administrative and judicial remedies as a prerequisite to a suit in inverse condemnation."

Hensler, 8 Cal.4th at 13. The California Supreme Court's statement disposes of petitioners' argument to the contrary, *i.e.*, that they are not challenging the City's nuisance determination and abatement order and therefore need not have obtained mandamus review of the City's decision.

Moreover, petitioners' claim that they are not contesting the findings and conclusions of Resolution 5009 but merely the manner in which it was applied and enforced necessarily assumes that they were willing to comply with the resolution. Petitioners argue that certiorari should be granted to determine whether a property owner can be required to pursue mandamus when the

property owner is not challenging the terms of the ordinance itself. Petitioners claim that they "are challenging the manner in which the City implemented Resolution 5009 and contending the City thwarted their efforts to comply with the resolution." Petition, p. 25.

In making that argument, petitioners appear to confuse the federal law principles involved in determining whether an inverse condemnation claim under the Fifth Amendment is ripe under *Williamson Planning Commission, supra,* with state law rules of preclusion. Indeed, petitioners cite *Williamson Planning Commission* and cases dealing with the ripeness doctrine. But whether the state has a "reasonable, certain and adequate provision for obtaining compensation" is simply not relevant to the *res judicata* holdings of the lower courts. As noted in Part IIB, *infra,* ripeness was never an issue in the courts below, because the lower courts held that petitioners were barred from pursuing this action on any grounds under the California preclusion rules. Thus, petitioners' second question presented asks the Court to decide an issue which would go to a possible defense to their claim (ripeness), when that defense was not a basis for deciding in the City's favor.

Moreover, the California courts properly rejected petitioners' argument that they are not challenging the Resolution but merely its application because the argument is demonstrably and factually false from the record. If petitioners are not challenging Resolution 5009 or the requirements imposed by the resolution, then they had absolutely no basis for refusing to comply. Petitioners cannot claim with a straight face that their efforts to comply with the abatement order were "thwarted," when petitioner Dale Robertson stood before the Municipal Court and declared that he would not comply with the order, and double-dog dared the City and the Court to bring on the bulldozer. As the lower courts correctly found, petitioners failed to comply with any aspect of

Resolution 5009 in a timely fashion. And, they openly declared that they would rely on prayer rather than court order to guide their actions. All of their rhetoric about being "thwarted" in their efforts to comply and about their beef with City actions occurring after adoption of Resolution 5009, therefore, is a smokescreen.

B. The Rule Applied By the California Courts and The Decision Below Do Not Conflict With Other Decisions

Petitioners' contention that the decisions below conflict with the Sixth Circuit's decision in *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694 (6th Cir. 1996), *cert. den.*, ___ U.S. ___, 117 S.Ct. 71, 136 L.Ed.2d 31 (1996) is wrong for several reasons.

First, the *Kruse* decision dealt with the issue of whether the State of Ohio had a "reasonable, certain and adequate provision for obtaining compensation" for purposes of determining ripeness under *Williamson Planning Commission v. Hamilton Bank, supra*. As discussed in greater detail in Part I, *supra*, the ripeness doctrine generally requires that property owners exhaust available state law compensation procedures before the federal courts will entertain a claim for compensation under the Fifth Amendment. Ripeness was never an issue in the California courts in this case, however. Thus, the unpublished decisions below cannot conflict with *Kruse* because the issue decided in *Kruse* simply was not litigated below.

Second, the *Kruse* case is distinguishable on several key factors. The Court in *Kruse* concluded that the plaintiffs therein had satisfied the ripeness doctrine due to a variety of factors. In *Kruse*, the Sixth Circuit observed that while Ohio's Appropriations statutes defined the procedures for the government's exercise of eminent domain powers and payment of just compensation, the statutes did not include a provision for owners to initiate inverse

condemnation cases. In *Kruse*, only a single Ohio Supreme Court case decided *after* the actions which constituted a taking in *Kruse* allowed a property owner to seek a writ of mandate to compel the government to initiate appropriations proceedings. 74 F.3d at 698-699. In the present case, California law has several statutes expressly relating to inverse condemnation cases[7], and California decisional authority clearly required mandamus challenges to quasi-judicial actions alleged to amount to takings for many years prior to the events alleged by petitioners. *See, Ham, supra; Rossco; supra.*

Moreover, the plaintiffs in *Kruse* had pursued state court remedies which resulted in a judgment in their favor, but which did not include monetary compensation. Thus, the City in *Kruse* had admitted that it had "taken" the plaintiffs' property and had not paid compensation for it. Here, of course, petitioners have not prevailed at any stage of the proceedings and, far from being an admitted fact, the question of whether there was a compensable taking has not been adjudicated because petitioners steadfastly refused numerous opportunities to present their case properly.

In addition, finally, the decision below is not published in any event, so there can be no concern about conflicting precedents. Petitioners' claim that the decision below somehow conflicts with *Kruse* is simply untenable.

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[7] *See*, e.g., California Code of Civil Procedure Section 1036 (providing for awards of costs, litigation expenses and attorneys' fees to prevailing plaintiffs in inverse condemnation cases); California Government Code Section 905.1 (exempting inverse condemnation actions from the claims filing requirements of California's Tort Claims Act).

III. PETITIONERS' COMPLAINT THAT THE CITY'S CONTRACTOR WENT BEYOND THE SCOPE OF THE NUISANCE ABATEMENT ORDER WAS ADEQUATELY DISPOSED OF BY THE CALIFORNIA COURTS

Petitioners ask this honorable Court to grant certiorari to decide whether actions by the City's independent contractor which allegedly went beyond the scope of the nuisance abatement order and warrant were "regulatory" takings or "physical" takings. Again, however, the California courts were best suited to determine how California rules of preclusion applied to the facts of this case.

Indeed, to the extent California courts have characterized the requirement that a petition for mandamus be pursued as applicable only in regulatory takings cases, the distinction between regulatory and physical takings for that purpose is purely an issue of California preclusion law, and does not present any federal question. True, the "regulatory takings" and "physical takings" labels have been employed by the federal courts, including this honorable Court, for purposes of determining whether a compensable taking has occurred. *E.g., Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

However, to the extent those labels are employed by the California courts in determining the scope of the California preclusion rules, their meaning in that context are matters of state preclusion law for the state court to resolve. The important fact is that the California courts held that *res judicata* barred petitioners' claims, not what labels may have been employed in the analysis.

Furthermore, the City's actions in this case were clearly regulatory under any analysis. According to petitioners, since their refusal to comply with the City's regulatory decision forced the City ultimately to resort to physical means to compel compliance, they were not required to pursue their mandamus remedies to challenge the City's decision.

By petitioners' reasoning, the fundamental purpose of the rule requiring a mandamus challenge could be defeated in every case simply by obstinate defiance. Ultimately, in every case of land use regulation, the only viable method of enforcement in the face of a recalcitrant land owner is by physical means. The important public policies which underlie the rule would be eviscerated if landowners were allowed to gain an advantage by such recalcitrance by being relieved of the mandamus requirement. Those important policies were in part articulated by the California Supreme Court in *Hensler, supra*:

> "The purpose of statutes and rules which require that attacks on land use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions, and actions which challenge the validity of land use statutes, regulations, and/or decisions, is to permit and promote sound fiscal planning by state and local governmental entities. As the Court of Appeal explained in *Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 612: 'The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required. If no such early opportunity were given, and instead, persons

> were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.' "

8 Cal.4th at 27-28.

Indeed, this Court has repeatedly held that it is the government's decision alone whether to exercise the power of eminent domain and pay compensation; landowners may not force the government to exercise its eminent domain powers:

> "Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function. . . . Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."

First English, supra, 482 U.S. at 319; *also see, Lucas, supra.*

Nevertheless, petitioners contend that since physical means were employed to enforce the City's regulatory action, they alleged a "physical taking," not a "regulatory taking." If petitioners' view were accepted, any landowner could force government to condemn property merely by, as petitioners did here, refusing to comply with regulations, and waiting until the government seeks to compel compliance therewith by its last resort: physical intervention.

This is not a case where a landowner ran out of time and could not find a way to comply with the City's abatement order in a timely fashion. Nor is this a case where a municipal government hastily and summarily abated a nuisance without regard to the landowner's interests. Rather, this is a case where petitioners simply

ignored the time requirements contained in the abatement resolution, and made no effort whatsoever to comply with (or challenge by a petition for writ of mandate) portions of that order. Moreover, both the City and the Municipal Court Judge offered to give petitioners even more time to commence remediation efforts, but petitioners made it clear that no amount of time would result in any change in position. Instead, petitioners unabashedly declared that it would take bulldozers to obtain compliance with the City's abatement resolution.

But that does not change the fact that the City merely exercised its authority to regulate land use. The City did not seek a physical solution to the nuisance; petitioners forced that remedy, and brought the result upon themselves, by failing and refusing either to abide by the regulation or challenge it in a Court of Law by a Petition for Writ of Mandamus. Both this High Court (*First English, supra,* 482 U.S. at 319) and the California courts, have repeatedly held that landowners may not unilaterally by their actions force agencies to condemn property:

> "A complaint in inverse condemnation, even one which does not expressly attack the validity of the ordinance or its application, and seeks only compensation for an alleged taking, must be deemed a challenge to the local action. This follows because the constitutional validity of the governmental action if uncompensated must be determined in the course of ruling on the claim that compensation is owed. Moreover, the validity of the action must be determined to afford the local entity the opportunity to rescind its action rather than pay compensation for a taking. *A landowner may not, by seeking only compensation, force a governmental agency to condemn the property.*"

Hensler, 8 Cal.4th at 7 (emphasis added).

> "[Hensler] seeks to do what the high [United States Supreme C]ourt says a landowner has no right to do – to force the city to exercise the power of eminent domain."

Hensler, 8 Cal.4th at 12.

Despite that principle, petitioners in the present case argue that they *do* have the right to "force the city to exercise the power of eminent domain" by defying the City's regulatory order without mounting any legal challenge, forcing the City to abate the nuisance, then seeking compensation for the physical invasion necessitated by petitioners' own recalcitrance. But, petitioners cannot convert the City's exercise of its regulatory power to a physical taking by their own stubbornness.

Finally, to the extent petitioners claim that the nuisance abatement order was exceeded, it was the independent contractor retained by the City that did the work. The City directed the contractor to carry out the terms of the abatement order and the contractor did so. If the contractor erred and went beyond the terms of the order, that does not constitute governmental action so as to trigger constitutional concerns.

Petitioners may have had viable remedies for these allegations in their state law tort claims of trespass and conversion. But petitioners allowed the contractor to escape liability by demurrer to the complaint. Petitioners failed even to appear at the demurrer hearing and failed to cure the pleading defect even though granted leave to amend the complaint. Pet. App. F, App. 36. Moreover, petitioners acquiesced in the trial Court's tentative ruling to grant the City's summary adjudication motion as to the trespass and conversion claims, and thereby waived any right to maintain those claims, as the Court of Appeal found. Pet. App. A, App. 18-19. Of course, any review of these issues by this Court would require this Court to engage in factual inquiries and examination of the evidentiary record and pleadings and review the factual

findings of the California trial and appellate courts in issues of State law. This Court should decline petitioners' invitation to do so.

CONCLUSION

The state courts below followed the precedents of this Court and applied California preclusions rules to petitioners' Fifth Amendment claims for compensation. In doing so, the lower courts correctly found and held that petitioners had failed to pursue a writ of administrative mandamus, which well-established California law required in order to pursue relief for an alleged taking. Granted leave to amend their complaint several times, petitioners failed to correct their error. Therefore, petitioners having failed to utilize the procedures for obtaining compensation which California law had provided, petitioners' claims under the Fifth Amendment of the United States Constitution are not ripe for adjudication. Moreover, petitioners' various *post hoc* rationalizations for their failure to pursue the available procedures for compensation were patently belied by the record below, and granting certiorari would require this court to re-examine the facts, evidence and findings of the lower courts. The unpublished Opinion of the California Court of Appeal does not create any conflict with the decisions of this Court or of the Circuit Courts of Appeals, and in fact follows the pertinent federal decisions. Petitioners have presented no important federal questions for review, and the Petition for Certiorari should be denied.

Dated: July 22, 1997

Respectfully submitted,

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RICHARDS, WATSON & GERSHON
A Professional Corporation

Attorney for Respondents
City of South Gate, California, et al.

APPENDIX I

Rule 976(b), California Rules of Court:

"No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

> "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> "(2) resolves or creates an apparent conflict in the law;
>
> "(3) involves a legal issue of continuing public interest; or
>
> "(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

Rule 976(c)(1), California Rules of Court:

"(1) An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b)."

Rule 977(a), California Rules of Court:

"(a) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other

action or proceeding except as provided in subdivision (b)."

Rule 977(b), California Rules of Court:

"(b) Such an opinion may be cited or relied on:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

"(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

APPENDIX J

IN THE MUNICIPAL COURT OF
SOUTHEAST/SOUTH JUDICIAL DISTRICT

COUNTY OF LOS ANGELES STATE OF CALIFORNIA

HON. FRANK GAFKOWSKI, JR., JUDGE — DIVISION III

IN THE MATTER OF THE APPLICATION OF THE CITY OF SOUTH GATE FOR A WARRANT TO DEMOLISH STRUCTURES AND ABATE NUISANCE AT THE PROPERTY LOCATED AT 5870 E. IMPERIAL HIGHWAY, SOUTH GATE, CALIFORNIA	)	MISC. NO. 1308

TRANSCRIPT OF PROCEEDINGS
October 30th, 1991

REPORTER'S TRANSCRIPT

APPEARANCES:

PROSECUTORS FOR THE CITY OF SOUTH GATE	STEVEN H. ROSENBLIT DAPEER & ROSENBLIT 2770 East Slauson Avenue Huntington Park, Ca 90255
For DALE ROBERTSON:	GENE W. BECKMAN Attorney at Law 374 East Avocado Crest Road La Habra Heights, Ca 90631
	CELIA BERNAL, C.S.R. #3959 OFFICIAL REPORTER

[p. 2] SOUTH GATE, CALIFORNIA, WEDNESDAY, OCTOBER 30th, 1991

THE COURT: The Court is on the record in the matter of the Application of the City of South Gate with respect to certain real property located at 5870 East Imperial Highway in the City of South Gate, State of California, Miscellaneous File No. 1308.

The Court has before it certain parties of interest in this matter: For the City of South Gate, Mr. Steven Rosenblit, who is by contract City Attorney in this matter; correct?

MR. ROSENBLIT: City Prosecutor, Your Honor.

THE COURT: City Prosecutor.

And we have the assistance of Mr. Cervantes.

MR. CERVANTES: Yes.

THE COURT: Encarnacion Cervantes, Director of Building.

To represent the interest of the property owner, Mr. Dale Robertson, is attorney Gene W. Beckman.

We are on the record. Now, as I understand there are certain terms and conditions which will be set forth as to a time frame; correct?

MR. ROSENBLIT: Yes, Your Honor.

Before I proceed, may I also have the record reflect that Mr. Robertson and perhaps his wife – she hasn't identified herself – are also present in the courtroom.

[p. 3] THE COURT: Yes. They are present.

Let me do this. I prepared a preamble to this matter to be of some assistance. And, if you then wish, Mr. Rosenblit, you can dictate what the terms and conditions are, just as such.

My order will be as follows. We will have this prepared and the Court will sign it and place it in the file at the conclusion of these proceedings. In other words, so you have something in writing if you wish to come back and look at it.

Anyway, we will start as follows:

The City of South Gate's application for a warrant to demolish structures and abate nuisances as ordered by its Resolution No. 5009 on August 26th, 1991, is approved by the Court – is approved by the Court and a warrant forthwith shall issue – pardon me – a warrant shall forthwith issue authorizing the City of South Gate to demolish the structures and abate the nuisances relating to the real property as described in Resolution 5009 and that respects the property at 5870 East Imperial Highway, South Gate, California. The execution of this warrant shall be stayed only on condition that certain acts are completed by the owners of said real property described in that Resolution 5009 in accordance with the following time schedule.

Failing any of the acts to be performed within the respective times as required, upon the ex parte affidavit of a responsible City official attesting to the [p. 4] same, the stay on this warrant shall be removed and this warrant may then be immediately executed.

Now, if you'd like to relate the terms and conditions.

MR. ROSENBLIT: Yes, Your Honor. I'd be glad to.

On or before November 14, 1991, at 3:00 p.m., the property owners must clear this property and remove the trailer and all other personal property including, without limitation, all tires, racks, rims and automobiles.

Further, the property owners must obtain City approval of the abatement of this nuisance in the condition of this property by November 14, 1991, at 3:00 p.m.

By December 2, 1991, at 4:00 p.m., the property owners must obtain a building permit from the City and start construction. Starting construction is defined as having building materials on site and filing a construction schedule with the Building Department of South Gate and having a contractor or job superintendent at the job site and working daily.

On or before February 2, 1991 [sic], construction is to be completed with City approval after final inspections.

THE COURT: Within that time, I presume.

In other words, final inspections and the construction completed prior to that date; correct?

MR. ROSENBLIT: Right. Prior to February 2, 1991.

Your Honor, I am not familiar if this was in your preamble or not. I don't recall.

[p. 5] THE COURT: About the three-day notice?

MR. ROSENBLIT: Yes.

THE COURT: I have something to follow, yes. So let's just see.

Mr. Robertson, did you hear the terms and conditions? Sir, if you'd like to step forward, you may.

MR. ROBERTSON: I heard part of it.

THE COURT: Okay. Mr. Robertson, just listen carefully.

Madam Reporter, just those terms and conditions, please.

(Record read.)

THE COURT: All right. Let's reword that last.

The construction is to be completed with City approval for final inspection having been obtained and filed by February 2nd, 1992, so that the inspection and approval or completion is within that frame, not to be open-ended.

MR. BECKMAN: Your Honor, to that point, in discussing delays, unavoidable delays, we have some language that was drafted, also, for us.

THE COURT: I can get into that.

But, Mr. Robertson, did you hear and understand and is that time frame and the conditions, are they agreeable with you, sir?

MR. ROBERTSON: Well, I hear it. I understand it. But whether I can comply with it or not is something –

THE COURT: Well, we are going to give you a relief valve if you have bad weather or some misfortune that can't [p. 6] be avoided. But aside from that, will you make a good-faith effort to abide by the terms and conditions?

MR. ROBERTSON: Well, I hear them. I understand them. But, as Gene knows, I have a boss that tells me, that small voice, I guess you could say, and that's all I go by.

THE COURT: Well, I mean, if you are telling me that you don't want to abide by these terms and conditions –

What you are saying is that you are not going to abide by these terms and conditions. Then I am going to issue the order now.

MR. ROBERTSON: Well, things come to me slowly. I have to – I rely on daily prayer and that's where I am right now.

THE COURT: Well, let me suggest this. Let's just take a moment.

Mr. Beckman, would you just explain to Mr. Robertson what I mean by a good-faith effort to comply.

Take a moment.

Let me explain, also, I will dictate this last term so that Mr. Robertson can keep that in mind, too.

The owners of said real property described in Resolution 5009 may make application to the Court for relief from the time requirements of this stay of execution, but

not any other performance requirements, upon three days' notice to the City of South Gate.

MR. ROSENBLIT: May I inquire, Your Honor?

THE COURT: Yes.

MR. ROSENBLIT: This process of application of [p. 7] three-day notice, wasn't that to apply only once construction has commenced? Because in your preamble you make reference to an affidavit in the event the first part of not clearing the property is not completed.

THE COURT: Well, the conditions upon which this order may be – the stay would be lifted are any of the things, as far as cleaning the property up, not beginning construction and so forth.

I think I have to give Mr. Robertson the opportunity also to have the possibility of a hardship with respect to cleaning the property up if the weather really turns bad or we have an earthquake or something. I understand the problems, but I have to give him that. But, obviously, the contingencies for cleaning the property would have to be very, very great to get any kind of relief. I think that would be fair.

Anyway, Mr. Beckman, take a moment, please.

(Brief recess.)

THE COURT: We are back on the record. Everyone is present.

I have just had a brief conversation with counsel in view of the remark I made at the end about the owner's seeking relief from some of the time restraints, not the

conditions, but the time of any of these conditions' performance. I think the City's concern is such that it is warranted that I limit that application for relief for time restraints only to the fact of the construction, not from things to be done prior thereto. This is the cleanup or the [p. 8] obtaining of permits or the start of construction.

I think when we were discussing matters in chambers, we were talking about the possibility of bad weather maybe hampering some of the construction work. That would be very well-taken to have a delay in the requirement.

So in that regard, with that correction, Mr. Robertson, do you understand the essence of what we are speaking?

MR. ROBERTSON: I think I do. If you look, I don't think you will find a tire business in the City of South Gate that doesn't have outside storage.

THE COURT: Well, I am not concerned with that type of discussion. At this point, Mr. Robertson, the question is: Do you feel you can live with the agreement that you are making in here? Because the alternative, sir, is if you tell me you feel you cannot or you have some other source giving you information or advice, I will sign the order tomorrow morning.

MR. ROBERTSON: The order to bulldoze me down, sir?

THE COURT: That's right, sir. The people have – the City of South Gate have sufficiently shown a concern for fire and safety and, I guess, the time has come to fish or cut bait.

MR. ROBERTSON: Yeah.

THE COURT: I am still willing to work with you. In fact, this is at my insistence that these time frames be put in here instead of just issuing the order today.

MR. ROBERTSON: Well, I owe the city of – the people [p. 9] in the City of South Gate to keep selling used tires. So if you say I cannot sell used tires anymore, then Imperial Tire is out of business and might as well be bulldozed. For 25 years you have not seen me in this courtroom. I have settled every little problem over tires, over service with the customer.

THE COURT: Well, Mr. Beckman, is that a no?

MR. ROBERTSON: All of a sudden I am a bad guy.

MR. BECKMAN: I am sorry.

THE COURT: Is that a no answer, that he can't make an agreement and live with it and do the best he can?

MR. ROBERTSON: I cannot remove – I can possibly screen the used tires so they are not seen. I wanted to put landscaping in there. I want to put a front brick wall on there.

THE COURT: Well, sir, it is not up to me to go over your plans. My concern is that the City of South Gate has followed the law, has a resolution – a hearing and a resolution was issued, in effect, requiring that the property be bulldozed. And it was my discussion with counsel to give you an opportunity to do things in a little timely fashion, give you some opportunity to do things in a more business-like way to protect your business, too, to see that you come back in, you know, and flourish.

Now you want to put the Court in a hard spot. The Court does, you know, makes orders all day long. I put people in jail, but that is not – I don't get any pleasure out of it, but that is my job. My job right now is to [p. 10] follow the law.

MR. ROBERTSON: Well –

THE COURT: You have that obligation, too, sir.

MR. ROBERTSON: Can you – I cannot say that I have done anything outside of the law. I proved to the city council that I was not 50-percent burnt, but that did not matter to them at all. At that time, if I am not 50-percent gone, I was supposed to have been able to rebuild.

THE COURT: Well, I am not going to rehear the City's matter. They made that determination, sir. If it is not me, it is somebody else that is going to make this order.

MR. BECKMAN: Your Honor, may I?

The removal of the tires and the other personal property is for the purposes of reconstructing the building and to clean up the property at that time. I don't think the issue of outside storage is a proper one for this nor is it definitive for your purposes after the building is reconstructed. That is a different battle which you might have to fight with the City of South Gate, but it is to clear off the premises for construction purposes.

MR. ROBERTSON: Do what you will, but it will take the bulldozer to move the tires.

MR. BECKMAN: Your Honor, I have nothing else.

MR. ROSENBLIT: Your Honor, I would propose the abatement warrant in view of the defendant's comment. May I lodge it with the Court?

THE COURT: Let me see it. If it is an order, I will sign it.

[p. 11] All right. The Court signs the warrant.

MR. ROSENBLIT: Thank you, Your Honor.

MR. BECKMAN: Thank you, Your Honor.

CERTIFICATE

STATE OF CALIFORNIA)
: ss
COUNTY OF LOS ANGELES)

I, CELIA BERNAL, C.S.R. #3959, do hereby certify:

That the foregoing is a full, true, and correct transcript of the testimony given and proceedings had in the aforementioned action taken on the aforementioned date;

That it is a full, true, and correct transcript of the evidence offered and received, instructions, acts, and statements of the Court, also all objections and exceptions of counsel, and all matters to which the same relate;

That I reported the same in stenotype, being the duly appointed, qualified, and acting Certified Shorthand

Reporter of said court, and thereafter had the same transcribed into typewriting as herein appears.

Dated this 31st day of October 1991.

/s/ Celia Bernal
CERTIFIED SHORTHAND
REPORTER